Reproductive Technology and Stolen Ova: Who is the Mother?

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Introduction

Unable to have children naturally, Loretta and Bacilli Jorge of Corona, California decided to undergo fertility treatment,[1] but Mrs. Jorge still did not become pregnant.[2] The fertility procedure involved removing some of her ova.[3] Mrs. Jorge, who did not intend to donate her eggs to other women, signed a form directing that she be the only one to use them.[4] In 1989, medical records showed that some of Mrs. Jorge's eggs were implanted into another woman who became pregnant and gave birth to twins, a boy and a girl.[5] The Jorges filed a suit seeking custody of the children,[6] but no decision has been issued to date.

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1. *See* Susan Kelleher & Kim Christensen, *Fertility Patients Fight Over Twins*, THE ORANGE COUNTY REG., Feb. 18, 1996, at A1.

2. *See* Susan Kelleher, *Family Feels Whole After the Birth of a Baby Boy*, THE ORANGE COUNTY REG., Feb. 4, 1997, at B1. The Jorges stopped the fertility treatment in 1995. *See id.* Mrs. Jorge found out that she was pregnant without the aid of fertility treatment in July 1996 and gave birth to a son in February 1997. *See id.*

3. *See* Kelleher & Christensen, *supra* note 1, at A1.

4. *See id.*

5. *See* Susan Kelleher & Dave Parrish, *Woman After Twins' Custody Meets with Birth Mother*, THE ORANGE COUNTY REG., Apr. 2, 1996, at B1. There may be other children produced from the eggs and sperm of the Jorges. *See* Kelleher, *supra* note 2, at B1. Five of their frozen embryos, the product of the Jorges' sperm and ova, were allegedly thawed in 1989. *See id.*

Dr. Ricardo Asch ran the University of California, Irvine Center for Reproductive Health, the fertility clinic that the Jorges used. *See id.* He admits that the clinic sold eggs without the consent of the "donors," but contends he is innocent. *See id.* Tei Ord, Asch's former chief biologist stated that Asch ordered that the eggs be misappropriated. *See* Jill Smolowe, *The Test-Tube Custody Fight: Victims of the Irvine Stolen-Egg Scandal Go After Twins*, TIME, Mar. 18, 1996, at 80, 80.

6. *See* Valeria Godines, *A Baby of Their Own but Couple Says Legal Fight for*

Over seventy women who received fertility treatment at the same clinic as the Jorges were either inadvertent donors or recipients of stolen eggs or embryos.[7] At least ten children are products of reproductive material allegedly stolen by the doctors at the clinic.[8] As a result, over eighty lawsuits and at least three custody suits have been filed against the university and doctors.[9]

There are an estimated 5.4 million infertile couples in the United States.[10] Approximately 300,000 individuals are treated for infertility each year.[11] In 1993, close to 39,000 couples in the United States attempted to create babies through various methods of artificial reproduction not including artificial insemination.[12] From 1981 to 1995, over 40,000 couples in the United States became parents using artificial reproduction techniques, and from 1982 to 1995, the number of infertility clinics increased from 5 to 315.[13] The infertility industry grosses approximately $2 billion annually.[14]

Many argue that reproductive technology devalues women,[15] takes advantage of poor women[16] and presents a host of other ethi-

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Twins Continues, THE PRESS-ENTERPRISE, Feb. 4, 1997, at A1.

7. *See* Kelleher & Parrish, *supra* note 5, at B1. Embryos, which are the product of sperm and ova, can be frozen by using a technique known as cryopreservation and saved for future attempts at *in vitro* fertilization. *See* Gina Maranto, *Embryo Overpopulation*, SCI. AM., Apr. 1996, at 16, 16. Michael Tucker, scientific director at Reproductive Biology Associates in Atlanta, estimated that there are approximately one million embryos stored worldwide, including at least 100,000 in the United States. *See id.* at 18. This number is expanding as many couples want to keep their embryos frozen for longer than five years. *See id.* at 16.

8. *See* Kelleher, *supra* note 2, at B1.

9. *See id.* The university settled two of the lawsuits in 1996 for $1.1 million. *See id.*

10. *See* Karen Brandon, *Emerging Fertility Clinic Scandal Has Californians Rapt*, CHI. TRIB., Mar. 24, 1996, § 1, at 6.

11. *See* Geoffrey Cowley, *Ethics and Embryos*, NEWSWEEK, June 12, 1995, at 66, 67.

12. *See id.* The first test-tube baby, Louise Brown, was conceived in 1978 in England through *in vitro* fertilization (IVF). *See* Denise Grady, *How to Coax New Life*, TIME, Fall 1996, at 37, 37.

13. *See* Cowley, *supra* note 11, at 67.

14. *See id.*

15. *See generally* GENA COREA, THE MOTHER MACHINE (1985) (arguing that the artificial reproduction industry is part of a system of male supremacy and that the industry devalues women); Michelle Stanworth, *Reproductive Technologies and the Deconstruction of Motherhood*, *in* REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD AND MEDICINE 10 (Michelle Stanworth ed., 1987) (arguing that reproductive technologies enable men to gain control over motherhood).

16. *See* Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 534 (1996).

> There is widespread concern that genetic parents, typically occupying a higher socioeconomic status, will take advantage of poor, uneducated women in the surrogacy bargaining process. The unequal bar-

cal concerns.[17] Nonetheless, as insurance coverage increases for methods of assisted conception, the use of artificial reproduction continues to grow.[18] Consequently, thousands of children will be born as a result of these technologies. Inevitably, some of these children will be caught in the middle of tense custody battles between the child's two biological mothers when the genetic mother's ova are used without her consent. Therefore, legal standards must be established that will best protect children in this situation.

In such a complex area, it is necessary to define the terminology used. The following are definitions of terms as they are used in this Note. A "genetic mother" is the woman who supplied the egg from which the child was created. The genetic mother does not carry the child in her womb. A "gestational mother" is the woman who carries in her womb the child created from the egg of the genetic mother.[19] Both the genetic and gestational mothers

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> gaining power of the parties, commentators fear, will produce grossly one-sided agreements that favor the genetic parents at the expense of the surrogate.

Id.

17. *See* Hilary Rose, *Victorian Values in the Test-tube: The Politics of Reproductive Science and Technology, in* REPRODUCTIVE TECHNOLOGIES: GENDER MOTHERHOOD AND MEDICINE 167-68 (Michelle Stanworth ed., 1987) (recognizing that the availability of pre-conception sex-selection may place undue pressure on women to have abortions in many countries); Stanworth, *supra* note 15, at 23 (noting that some people view IVF as an "assault[ ] on marriage and family"). The societal impact of eugenics, which is the "science of the improvement of the human species by genetic means," also presents important concerns. PATRICIA SPALLONE, BEYOND CONCEPTION: THE NEW POLITICS OF REPRODUCTION 133-54, 199 (1989); *see also* Stanworth, *supra* note 15, at 28 (noting that some people fear reproductive technology as a "tool[ ] for encouraging the propagation of the 'superior', [sic] or for reducing the numbers of hereditary unfit").

18. Some states have passed legislation requiring fertility treatments, including *in vitro* fertilization, to be a covered expense under insurance policies generally or under policies that provide pregnancy-related coverage. *See* ARK. CODE ANN. §§ 23-85-137, 23-86-118 (Michie 1994); CONN. GEN. STAT. ANN. § 38a-536 (West 1994); HAW. REV. STAT. §§ 431:10A-116.5, 432:1-604 (1995); 215 ILL. COMP. STAT. 5/356m (West 1995). Some states mandate coverage for fertility treatment, but exclude *in vitro* fertilization. *See* CAL. HEALTH & SAFETY CODE § 1374.55 (West 1994); CAL. INS. CODE §§ 10119.6, 11512.28 (West 1994). Others define "basic health care service" to include treatment for infertility. *See* MONT. CODE ANN. §§ 33-31-102 (1)(h)(v) (1995); OHIO REV. CODE ANN. §§ 1742.01(A), 1742.03(c)(1)(b) (Banks-Baldwin 1995); W. VA. CODE § 33-25A-2(1) (1995).

19. Generally, the term gestational mother refers to the surrogate who intends to surrender parental rights to the genetic parents. *See* Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN'S L.J. 329, 341 (1995). A gestator who intends to raise the child is known as the "mother" while the woman supplying the egg is called the ovum donor. *See id.* This Note refers to the woman who performs the gestative function as the gestational mother regardless of her intent and to the woman who supplies the eggs as the genetic mother. This is because in the case of stolen reproductive material, it is not clear which woman is the "mother."

are "biological mothers."[20] An "adoptive mother" is a woman who intends to raise a child produced from donated ovum and carried in a gestational surrogate's womb. A woman who is genetically related to the baby and carries it in her womb, but who becomes pregnant through assisted reproduction and intends to give the baby to another couple, is a "traditional surrogate." "Collaborative reproduction" refers to the process of using the gametes[21] and womb of three people to create a baby, who may or may not be raised by adoptive parents who are not genetically or gestationally related to the child.[22]

In the absence of applicable statutes, courts have used a variety of standards in adjudicating custody disputes in cases where the child was created through artificial reproduction involving a traditional surrogate mother and, in cases where the child has *two* biological mothers, a gestational and genetic mother.[23] However, as of this writing, no court has issued a decision regarding a custody dispute involving a child's two biological mothers where the reproductive material was either stolen or mistakenly used. Where either the egg or womb was knowingly donated, courts have used two standards to resolve custody disputes between two biological mothers: the intent doctrine and the genetic test.[24] The first is unworkable when the case involves stolen reproductive material[25] and the second operates to treat children as possessions.[26] Due to the growth of artificial reproduction and the possibility of mistakes[27] and illegal activity on the part of infertility clinics,[28]

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20. "Biological" means "pertaining to, caused by, or affecting life or living organisms." THE AMERICAN HERITAGE DICTIONARY 180 (2d ed. 1985).

21. A gamete is a reproductive cell capable of uniting with another reproductive cell in the process of fertilization. *See* BLAKISTON'S GOULD MEDICAL DICTIONARY 543 (4th ed. 1979).

22. As defined in this Note, adoptive parents, who intend to raise the child but who are not biologically related to the child, are included as participants in collaborative reproduction.

23. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (using the intention of the contracting parties regarding who would raise the child to determine to which biological parent to grant custody of a child carried by a gestational surrogate); *In re* Baby M., 537 A.2d 1227 (N.J. 1988) (using the best interests of the child standard to determine with which biological parent the child should live: the surrogate mother or the biological father and his wife); Belsito v. Clark, 644 N.E.2d 760 (Ct. C.P. Ohio 1994) (holding that the genetic relationship is determinative of legal parentage).

24. *See infra* notes 132-71 and accompanying text.

25. *See infra* beginning of Part II (explaining that no common intent would be present between two biological mothers if the ova were stolen).

26. *See infra* notes 194-95 and accompanying text.

27. For example, through IVF performed in the Netherlands, Wilma Stuart gave birth to twins who had different fathers. *See* Dorinda Elliott & Friso Endt,

there is a potential for more couples to find themselves in the position of the Jorges. As a result there may be a tremendous, negative impact upon the lives of the children in this situation.

This Note will examine which standard should be used to determine whether the gestational or genetic mother should be recognized as the legal mother of a child who is the product of an ovum or an embryo used without the consent of the genetic mother.[29] This Note will also discuss whether the non-custodial, or non-legal, mother has any rights with respect to the child.

Part I.A of this Note briefly describes the methods of collaborative reproduction which enable the two biological elements of motherhood, genetics and gestation, to be separated.[30] Part I.B.1 discusses two issues: (1) whether exercising the right to procreate establishes any parental rights in the procreators;[31] and (2) whether collaboratively reproducing constitutes an exercise of the right of procreation.[32] Part I.B.2 discusses the fundamental rights of parents and the aspects of parenthood from which they are derived.[33] Part II analyzes three competing standards for establishing maternity in the context of stolen or mistakenly-used genetic material: genetics, gestation and the best interests of the child.[34] Under the first two standards, the parents' interests are central to the outcome, and the child is treated as a possession of either the genetic or gestational mother rather than a legally-cognizable individual.[35] Under the last standard, often referred to as the "best

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Twins—with Two Fathers, NEWSWEEK, July 3, 1995, at 38, 38. The most probable explanation is that a technician reused a pipette containing some sperm from a prior insemination. *See id.*

28. The temptation to implant a woman's fertile eggs into another woman without the consent of the woman from whom the eggs came is high as this industry is very lucrative. *See* Lisa Gubernick & Dana Wechsler Linden, *Tarnished Miracle*, FORBES, Nov. 6, 1995, at 98, 98-101. The average cost per cycle of IVF is $8000. *See id.* at 100. The cost of delivering a baby conceived through IVF ranges from $66,667 for a couple that conceives after the first attempt to $800,000 if the woman is over 40 years old and attempts IVF six times before becoming pregnant. *See id.*

29. In the case of a stolen or mistakenly-used embryo, the genetic father has interests very similar to those of the genetic mother. His interests may be stronger, however, because he is the child's only biological father. Due to the unique situation of the two biological mothers, this Note focuses on the three separate elements of parenthood in mothers rather than fathers. The father's interests are relevant in determining custody and assigning parental rights.

30. *See infra* notes 40-52 and accompanying text.

31. *See infra* notes 62-82 and accompanying text.

32. *See infra* notes 83-106 and accompanying text.

33. *See infra* notes 108-71 and accompanying text.

34. *See infra* notes 172-268 and accompanying text.

35. *See infra* Parts II.A, II.B.

interests of the child" standard, the child's interests are paramount.[36]

Adopting the best interests of the child standard, this Note concludes that in an action challenging maternity, there should be a presumption that the caretaker of the child, who is usually the gestational or adoptive mother, is the child's legal mother once the infant-mother bond is formed.[37] The non-custodial mother may be awarded visitation rights if she establishes that visitation is in the best interests of the child.[38] If the action is concluded during pregnancy, or when the baby is very young, it is not necessarily in the best interests of the child to live with its gestational or adoptive mother because the child does not yet have a strong attachment with the gestational or adoptive mother.[39] In this situation, the court should decide the dispute by answering the question: "With which mother would it be in the child's best interests to live?"

I. Background

A. Methods of Collaborative Reproduction

Several methods of artificial reproduction enable a woman to carry a baby produced from another woman's egg. The following assisted reproduction techniques can create a pregnancy by using one man and one woman or one man and two women. *In vitro* fertilization (IVF) is the fertilization of a woman's egg (ovum) with a man's sperm in a petri dish.[40] Once the fertilized egg divides and becomes multicellular, it is implanted into a woman's uterus.[41] Al-

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36. *See infra* Part II.C.

37. *See* discussion *infra* notes 293-302 and accompanying text (reasoning that this will minimize the potential harm to the child's development).

38. *See* discussion *infra* notes 289-90.

39. If the action begins during the pregnancy, it might last longer than the duration of the pregnancy, such that by the time a decision is reached the child may have formed a bond with the gestational or adoptive mother.

40. *See* Stephanie F. Schultz, *Surrogacy Arrangements: Who are the "Parents" of a Child Born Through Artificial Reproductive Techniques?*, 22 OHIO N.U. L. REV. 273, 274 (1995); Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 269 (1995). To induce superovulation which facilitates egg removal, women are given fertility hormones. The eggs are surgically removed through a procedure called laparoscopy or through aspiration, which is a less risky process. *See Developments in the Law: Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1537 n.73 (1990) [hereinafter *Developments in the Law*].

41. *See Developments in the Law, supra* note 40, at 1538. The embryos are implanted in the woman's uterus when they are at the two to sixteen cell stage. *See* OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, INFERTILITY: MEDICAL AND SOCIAL

ternatively, after fertilization, the embryo can be frozen for later implantation.[42] This technique is cryopreservation.[43] IVF has resulted in more than 26,000 births in America.[44] There are at least three other methods by which eggs are removed from a woman's body and then implanted into her or another woman's uterus in an attempt to create a pregnancy: gamete intrafallopian transfer (GIFT),[45] zygote intrafallopian transfer (ZIFT)[46] and immature egg harvest.[47]

Collaborative reproduction can involve up to five adults: a sperm donor, an egg donor, a gestator, and two nonbiologically related individuals intending to raise the child.[48] Two women can be involved in the creation of a child in at least three situations.[49] First, a woman may donate eggs that, upon fertilization, will be implanted into the uterus of an infertile woman who intends to raise the child.[50] Second, a woman intending to raise the child who is carried by a gestational surrogate may provide the eggs.[51] Third, a couple intending to adopt the child arranges for a surro-

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CHOICES 123 (1988).

42. *See* Maranto, *supra* note 7, at 16. The term ovum donation is used when the genetic mother does not intend to raise the child. *See* King, *supra* note 19, at 340.

43. *See* ROBERT SNOWDEN ET AL., ARTIFICIAL REPRODUCTION: A SOCIAL INVESTIGATION 22-23 (1983).

44. *See* Grady, *supra* note 12, at 37.

45. GIFT is the process by which an egg and sperm are inserted into a woman's fallopian tube. *See* Grady, *supra* note 12, at 38; SPALLONE, *supra* note 17, at 56. If the sperm fertilizes the egg, creating an embryo, the resulting embryo travels into the uterus naturally. *See* Grady, *supra* note 12, at 38.

46. In ZIFT the egg and sperm are mixed in a lab to achieve fertilization, as in IVF. *See* Grady, *supra* note 12, at 38. The resulting zygotes are placed in the woman's fallopian tube. *See id.* A zygote is an organism produced by the union of two reproductive cells. *See* BLAKISTON'S GOULD MEDICAL DICTIONARY, *supra* note 21, at 1496.

47. Conception through immature egg harvest is achieved through the same methods as IVF, except immature rather than mature eggs are harvested from the woman. *See* Grady, *supra* note 12, at 38.

48. *See* John Lawrence Hill, *What Does it Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 355 (1991). Hill includes a chart showing the 16 different combinations capable of producing a child through artificial reproduction. *See id.* The 16 combinations are the product of varying the source of the male gametes (whether by husband or third-party sperm donor), the source of the female gametes (whether by wife or third-party egg donor), the location of fertilization (whether in the wife, the laboratory, or the surrogate host), and the site of gestation (either in the wife or the surrogate). *See id.*

49. *See* Anne Goodwin, *Determination of Legal Parentage in Egg Donation, Embryo Transplantation, and Gestational Surrogacy Arrangements*, 26 FAM. L.Q. 275, 276 (1992).

50. *See id.* at 276-77.

51. *See id.* at 277.

gate to carry a child produced by donated eggs, which do not belong to the surrogate or the adoptive mother.[52]

B. The Law on Procreation and Parental Rights

Before determining the strength of each mother's claim for recognition as the legal parent, the source of parental rights[53] should be identified. This section will present the various events and circumstances from which parental rights are derived.

1. The Right to Procreate

In *Skinner v. Oklahoma*,[54] the Supreme Court stated that the right to procreate is "one of the basic civil rights of man . . . fundamental to the very existence and survival of the race."[55] This right is derived from the right to privacy[56] stemming from the Due Process Clause of the Fourteenth Amendment.[57] The right to procreate includes the right to have a child, a positive right,[58] as well as the right to avoid pregnancy, a negative right.[59]

Cleveland Board of Education v. LaFleur[60] illustrates the positive right of procreation. In that case, a teacher was forced to take unpaid maternity leave with no guarantee that she would be able to return to her job.[61] Recognizing that there is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child," the Court held that the teacher's right to procreation was unjustifiably infringed.[62] The Court's holding implies a

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52. *See id.*

53. For a partial list of parental rights, see *infra* text accompanying note 119.

54. 316 U.S. 535 (1942).

55. *Id.* at 541. The *Skinner* Court struck down a statute that called for the sterilization of habitual criminals. *See id.* at 535.

56. The right to privacy stems from the penumbras of the First, Third, Fourth, Fifth and Ninth Amendments. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

57. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977).

58. *See Skinner*, 316 U.S. at 541. The positive right to procreate is the right to have a child.

59. The negative right was established in a series of cases dealing with access to contraceptives. *See Carey*, 431 U.S. at 678 (holding that minors have a right of access to contraceptives); Eisenstadt v. Baird, 405 U.S. 438, 438 (1972) (holding that unmarried individuals have the right of access to contraceptives); *Griswold*, 381 U.S. at 479 (establishing the right, among married couples, to use contraceptives).

60. 414 U.S. 632 (1974).

61. *See id.* at 636-37.

62. *Id.* at 640 (quoting *Eisenstadt*, 405 U.S. at 453). Apart from the holding in *LaFleur*, the language quoted from *Eisenstadt* implies that the right to procreate is

positive right to procreation because the teacher must become pregnant before maternity leave is possible.[63]

a. Whether the right to procreate includes at least some limited parental rights

It is unclear whether the right to procreate includes parental rights with respect to the child as well as the right to biological reproduction.[64] Those arguing that it includes parental rights note that procreation seems to be of little value if the progenitors do not acquire the right to parent the child.[65]

The New Jersey Supreme Court, in *In re Baby M.*,[66] held that the right to procreate does not include the right to raise the child,[67] but suggested it encompasses other parental rights.[68] In *Baby M.*, Mary Beth Whitehead entered into a surrogacy contract in which she agreed to be artificially inseminated with William Stern's sperm, relinquish her parental rights and deliver the child to Mr. and Mrs. Stern for $10,000.[69] After the baby was born, Mrs. Whitehead decided she would not relinquish her parental rights.[70] The Sterns filed a suit seeking termination of Mrs. Whitehead's parental rights and sole legal custody of Baby M.[71] The Sterns asserted the right to procreate, and Mrs. Whitehead claimed the right to the companionship of the baby.[72]

The court stated that the right to procreate "is the right to have natural children, whether through sexual intercourse or artificial insemination."[73] Under this definition, the court concluded

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not limited to avoiding procreation, but includes the right to choose to bear a child. *See* Roger J. Chin, *Assisted Reproductive Technologies: Legal Issues in Procreation*, 8 LOY. CONSUMER L. REP. 190, 208 (1996).

63. *See* Chin, *supra* note 62, at 208.

64. *See* Hill, *supra* note 48, at 367.

65. *See id.* at 368; Chin, *supra* note 62, at 213.

66. 537 A.2d 1227 (N.J. 1987).

67. *See id.* at 1253-54.

68. *See infra* text accompanying notes 78-80 (explaining that Mrs. Whitehead was entitled to visitation because she was the child's biological parent).

69. *See* 537 A.2d at 1235.

70. *See id.* at 1236. Upon giving up her baby, Mrs. Whitehead could not eat, sleep or concentrate. *See id.* She told the Sterns of her desire to regain custody of the baby. *See id.* Fearing that she would commit suicide, the Sterns agreed to let her have Baby M. for one week. *See id.* Mrs. Whitehead fled to Florida with Baby M., and the child was not returned to the Sterns until four months later. *See id.*

71. *See id.* at 1237.

72. *See id.* at 1253. The court did not address Mrs. Whitehead's claim because it concluded that she was the child's legal mother and the right to companionship with one's child is a parental right. *See id.* at 1253, 1255.

73. *Id.* at 1253. The court did not address Mrs. Stern's right to procreate because it found the surrogacy contract to be illegal. *See id.* at 1240. Thus, it is un-

that both Mr. Stern and Mrs. Whitehead had exercised the right to procreate.[74] While the court recognized that "the custody, care, companionship, and nurturing that follow birth" may be afforded constitutional protection, it held that those rights "are not part of the right to procreation" because different interests are relevant for defining rights which affect the resulting child.[75] Therefore, the right to custody does not arise from exercising the right to procreate.[76] The court resolved the custody issue by applying the best interests of the child standard.[77] The court granted custody to Mr. Stern[78] and visitation rights to Mrs. Whitehead.[79]

Despite the court's conclusion that procreating does not entitle one to custody of a child, by finding that Mrs. Whitehead was entitled to visitation, the court suggested that being a biological parent is sufficient to give one some limited aspects of parental rights.[80] Analyzing the scope of the right to procreate reveals that:

> [t]he right of procreation elaborated in *Baby M.* is analogous to that possessed by noncustodial parents: it includes the minimum rights to take part in certain fundamental child-rearing decisions, to visit the child, to bring an action modifying the custody award, and the duty to provide child support. In short, exercising the right of procreation is sufficient to make one a "parent" in the legal sense.[81]

The court's decision did not provide a practical test to determine what elements must exist in order to be a procreator. In deciding that Mrs. Whitehead was the legal mother, the court simply stated that she had exercised the right to procreate.[82]

b. Whether collaborative reproduction is an exercise of the right to procreate

There are two main differences between collaborative reproduction and sexual reproduction. First, collaborative reproduction

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clear whether the right to procreate extends to an infertile person through the use of artificial reproduction or, in other words, whether a biological connection is necessary to be a procreator.

74. *See id.* at 1253-54.

75. *Id.* at 1253. The court did not specify the constitutional provision from which these rights flow.

76. *See id.* The court focused on the best interests of the child, rather than the rights of the parents, because "a person's rights of privacy and self-determination are qualified by the effect on innocent third persons of the exercise of those rights." *Id.*

77. *See id.* at 1256.

78. *See id.* at 1256-61.

79. *See id.* at 1261-63.

80. *See* Hill, *supra* note 48, at 369.

81. *Id.*

82. *See Baby M.*, 537 A.2d at 1254.

does not involve sexual intercourse.[83] Second, collaborative reproduction, unlike sexual reproduction, is not rooted in history and tradition because it involves relatively new scientific technology and requires the gametes and womb of more than two people to create a child.[84]

The legal impact of the first difference is uncertain because it is unclear whether the right to procreate is limited to coital reproduction.[85] Elements of sexual liberty and procreative choice combine to form the rationale for recognizing the right to use contraceptives.[86] The Supreme Court has not determined, however, whether the right to procreate without sexual intercourse is constitutionally protected or, in other words, whether there is a right to engage in collaborative reproduction.[87]

Carey v. Population Services International[88] suggests that sexual activity is not protected apart from procreation.[89] In *Carey*, the Supreme Court held that the right to privacy gives minors the right of access to contraceptives.[90] *Carey* clarified that sexual liberty was not the only reason for holding that restrictions on the distribution of contraceptives must serve a compelling state interest:

> [W]e do not hold that state regulation must meet this [compelling interest] standard "whenever it implicates sexual freedom" or "affect(s) adult sexual relations" but only when it "burden(s) an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision." As we observe below, "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating (private consensual sexual) be-

83. *See supra* notes 40-42, 45-48 and accompanying text; Chin, *supra* note 62, at 202.

84. *See supra* notes 48-52 and accompanying text (explaining the different ways to create a child involving three adults); *see also* Chin, *supra* note 62, at 214 (arguing that the introduction of a third party surrogate into the reproductive process removes surrogacy from the category of values protected by the Fourteenth Amendment).

85. *See* Hill, *supra* note 48, at 367; *see also* Johnson v. Calvert, 851 P.2d 776, 791 (Cal. 1993) (Kennard, J., dissenting) (asserting that the right to procreate should extend to infertile persons); John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 960 (1986) (arguing that the right to procreate should extend to noncoital means of reproduction).

86. *See* Chin, *supra* note 62, at 202; *see also supra* note 50 (stating the holdings of the right to contraception cases).

87. *See* Chin, *supra* note 62, at 202-03.

88. 431 U.S. 678 (1977).

89. *See* Chin, *supra* note 62, at 203.

90. *See* 431 U.S. at 678.

havior among adults," and we do not purport to answer that question now.[91]

Furthermore, *Bowers v. Hardwick*,[92] a case involving homosexual sodomy, suggests that sexual activity, without a demonstrated connection to marriage, family or procreation is not sufficient to implicate privacy interests under the Due Process Clause.[93] The *Bowers* Court held that there is no constitutionally protected right to engage in sodomy.[94] Whether the right to procreate is dependent upon the presence of other factors, such as coital sexual activity, is unclear.[95]

The conclusion in *Carey* that sex is given the greatest constitutional protection when procreative rights are implicated suggests that collaborative reproduction may be protected under the right to privacy.[96] Collaborative reproduction is closer to the interests in *Carey* than those in *Bowers* because it involves the decision whether or not to create a family.

Nevertheless, the opposite conclusion may be reached as well. First, *Carey* suggests that the scope of constitutional protection for sexual activity is unclear, but that when it is combined with the negative right of procreation, avoiding pregnancy, it receives maximum constitutional protection. It does not necessarily follow that the positive right to procreate, producing a baby, without intercourse is protected by the right to privacy. Furthermore, the right to privacy may not be sufficient to protect the right to procreate even though the right of procreation is generally considered a privacy right.[97] This is because exercising the right to procreate depends upon the cooperation of others, while exercising the right to privacy does not.[98]

The second difference between sexual reproduction and collaborative reproduction is that the latter is not rooted in history and tradition. The Supreme Court is generally reluctant "to extend the right of privacy to new relationships and activities" be-

91. *Id.* at 688 n.5 (citations omitted); *see* Chin, *supra* note 62, at 203 ("[I]t is questionable whether sexual liberty, separated from procreation, is adequate to raise a claim of substantive due process.").

92. 478 U.S. 186 (1986).

93. *See id.* at 191.

94. *See id.*

95. *See supra* text accompanying notes 85-87 (discussing the right of procreation).

96. *See supra* text accompanying note 91 (explaining that the government must satisfy the highest level of scrutiny when it burdens an individual's decision whether to continue or terminate a pregnancy).

97. *See* Hill, *supra* note 48, at 383-84.

98. *See id.* at 384.

cause of the importance of history and tradition.[99] The Supreme Court focuses on the values of the activity as rooted in history and tradition, rather than historical practices, in determining whether constitutional protection is warranted.[100] Although technology by itself does not alter the values of procreation,[101] the introduction of a third party into the reproductive process changes the social understanding of procreation. Therefore, collaborative reproduction may not be "implicit in the concept of ordered liberty."[102] Viewed this way, history and tradition do not support constitutional protection of collaborative reproduction.

Apart from the sexual aspect, commentators argue that procreation can be divided into three elements: genetic, gestational and social.[103] The social aspect is the intent to raise the child as one's own.[104] Neither the Supreme Court nor the lower courts

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99. Michael H. v. Gerald D., 491 U.S. 110, 123 (1989) (stating that history and tradition should govern which relationships and activities are protected by the Constitution). In *Bowers*, the Court emphasized the role of history and tradition in establishing substantive Due Process rights:

> [The Court is not] inclined to take a more expansive view of [its] authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution . . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

478 U.S. at 194-95.

100. *See* Chin, *supra* note 62, at 202; *see also Michael H.*, 491 U.S. at 122-23 (emphasizing the importance of the values of history and tradition). In *Planned Parenthood v. Casey*, the Court noted that rights guaranteed by substantive Due Process are not limited to historical practices:

> It is also tempting . . . to suppose that the Due Process Clause protects only those practices defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter . . . . Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.

505 U.S. 833, 847-48 (1992) (citations omitted).

101. A couple's interest in noncoital reproduction is the same as in coital reproduction where the same couple provides the genetic, gestational and social elements of procreation. *See* Robertson, *supra* note 85, at 960. Because this form of assisted reproduction does not introduce any third parties, it is a form of assisted reproduction consistent with the traditional values underlying procreation. *See id.*

102. *See* Chin, *supra* note 62, at 214 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

103. *See id.* at 209-10.

104. *See id.* at 210. Courts often refer to this element as intent. *See id.* In the

have addressed the issue of whether the exercise of any one or a combination of these three elements is an exercise of the right to procreate. The lower courts, however, have used these elements to decide custody disputes between two biological mothers.[105] These decisions suggest that genetics, gestation and the intent to raise the child as one's own are also the elements of parenthood. In two of these cases, the courts held that the legal mother was the woman who exhibited two of the three elements.[106] While one court held that genetic motherhood is determinative, this holding also resulted in recognizing the woman who possessed two of the three elements--genetics and intent/social--as the legal mother.[107]

2. Parental Rights

a. Parents' fundamental rights with respect to their children

Paternal rights in Colonial and nineteenth-century America paralleled the rights of property owners.[108] The rights of a property owner included the right to use or transfer one's property and the right to exclude others from one's property.[109] Similarly, under the patriarchal theory of parental rights, children were treated "as

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remainder of this Note, this element is referred to as "intent/social."

105. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (considering the allocation of genetics, gestation and intent to create and raise the child in determining the child's legal mother); McDonald v. McDonald, 608 N.Y.S.2d 477 (Sup. Ct. 1994) (basing the decision on the allocation of genetics, gestation and intent among the child's two mothers); *cf.* Moschetta v. Moschetta, 30 Cal. Rptr. 2d 893 (Ct. App. 1994) (finding that intent to raise the child, as agreed to in a traditional surrogacy contract, is irrelevant where the intending mother does not also possess the genetic or gestational element).

106. *See* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993); McDonald v. McDonald, 608 N.Y.S.2d 477, 478-80 (Sup. Ct. 1994); *infra* notes 133-42 and accompanying text (discussing cases where the courts considered the three elements of procreation).

107. *See* Belsito v. Clark, 644 N.E.2d 760, 761 (Ct. C.P. Ohio 1994); *infra* notes 143-49 and accompanying text (discussing the decision of the *Belsito* court).

108. *See* Jacobus Ten Broek, *California's Dual System of Family Law: Its Origin, Development, and Present Status (Part I)*, 16 STAN. L. REV. 257, 287 (1964) ("Feudal law did not recognize the family as such or assign rights and duties to its members by virtue of membership. Property rights were the only privileges which the king's courts would enforce between father and son."); *see, e.g.*, Campbell v. Wright, 62 P. 613, 614 (Cal. 1900) (finding that a father's right to custody of his child is a property right; *see also* Carrol Leavell, *Custody Disputes and the Proposed Model Act*, 2 GA. L. REV. 162, 166 (1968) (explaining that courts in early American cases treated children as various forms of property interests); Paul Sayre, *Awarding Custody of Children*, 9 U. CHI. L. REV. 672, 674-75 (1942) (explaining that courts' notions of custody were similar to property interests such as "possession" or "title").

109. *See* LAWRENCE BECKER, PROPERTY RIGHTS: PHILOSOPHICAL FOUNDATIONS 18 (1977).

assets of estates in which fathers had vested interests . . . . [T]heir services, earnings, and the like became the property of their paternal masters in exchange for life and maintenance."[110]

Until the mid-1880s parents could give up their right to the child's labor by transferring the right to a master via a formal instrument of indenture or apprenticeship.[111] In exchange, the master agreed to provide the child with food, clothing and a vocational education.[112] The parents also had the right to prevent others from interacting with their children by exercising sole custody or control.[113] For example, a parent could seek damages for the seduction of a daughter or refuse to grant a suitor permission to marry a daughter.[114]

During the nineteenth and early twentieth centuries, social changes initiated a shift in the rationale in custody disputes from the father's property right in the child to the best interests of the child.[115] As more men worked outside of the home, fathers became less involved in households.[116] At the same time, affection became more important than status to domestic bonds.[117] This resulted in the recognition of a mother's role in rearing her children and a concern for the welfare of children.[118] Meanwhile, the doctrine of

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110. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 25 (1985); *see* Barbara Bennet Woodhouse, *"Who Owns the Child?": Meyer and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1045 (1992) (explaining that the child's labor was a productive asset that the father was entitled to utilize in farming, caring for younger children, etc.); *see, e.g.*, Eustice v. Plymouth Coal Co., 13 A. 975 (Pa. 1888) (upholding parent's right to receive his or her child's wages).

111. *See* STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 15-16 (1988). However, at common law parental rights were unalienable and inviolable; thus, they were not transferable as were property rights. *See* Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 6 (1997).

112. *See* MINTZ & KELLOGG, *supra* note 111, at 15-16.

113. *See* Woodhouse, *supra* note 110, at 1046.

114. *See id.*; *see also* GROSSBERG, *supra* note 110, at 45 (noting that while a father could receive damages for the seduction of his daughter, which was sexual intercourse outside of wedlock, a daughter could not because the law did not recognize that she had suffered a loss).

115. *See* GROSSBERG, *supra* note 110, at 234-43; Judith T. Younger, *Responsible Parents and Good Children*, 14 LAW & INEQ. J. 489, 497 (1996) (discussing the changing focus of courts in custody cases).

The focus on the child's interests was first manifested in the "tender years" presumption in which living with her mother was presumed to be in the best interests of a very young child. GROSSBERG, *supra* note 110, at 240-42.

116. *See* GROSSBERG, *supra* note 110, at 7.

117. *See id.* The definition of a parent shifted to "one who forms a child's mind rather than one who brings a child into the world." *Id.* at 237 (citations omitted).

118. *See id.* at 235.

parens patriae[119] expanded, allowing courts to bypass the paternal biases of the common law.[120]

In the 1920s, the Supreme Court recognized that the Fourteenth Amendment[121] protects the parent-child relationship. In two landmark decisions, the Supreme Court recognized that parents have the right to educate their children in the manner they choose without governmental interference.[122] Specifically, in *Meyer v. Nebraska*, the Court struck down a statute that impermissibly interfered with the right of parents to control their children's education.[123] Similarly, in *Pierce v. Society of Sisters*, the Supreme Court held that a state statute was unconstitutional because it impermissibly infringed upon the parents' liberty in shaping their child's development.[124] These cases are cited for the proposition that the Constitution protects the parent-child relationship.[125]

Today, a parent has an interest in "the companionship, care, custody, and management of his or her children."[126] Parental rights include the right to: physically possess one's child through either visitation or custody rights; make decisions regarding the child's education and health; control and discipline one's child; manage the child's earnings and property; and, teach moral standards, religious beliefs and elements of good citizenship.[127]

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119. *Parens patriae* "refers traditionally to role of state as sovereign . . . acting on behalf of the state to protect the interests of the child. It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

120. *See* GROSSBERG, *supra* note 110, at 236-37.

121. The Fourteenth Amendment of the United States Constitution provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

122. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

123. *See* 262 U.S. at 400-01. The statute at issue made it illegal to teach foreign languages or to teach subjects in foreign languages to children below eighth grade. *See id.* at 400.

124. *See* 268 U.S. at 534. The statute required the attendance of young children in public school. *See id.*

125. *See* Lehr v. Robertson, 463 U.S. 248, 258 (1983) (stating that in "[*Meyer* and *Pierce*] the Court found that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection."); *see, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 231 (1972) (holding that the First and Fourteenth Amendments prohibit a State from requiring Amish parents to send their children to high school until age 16 if the children graduated from the eighth grade).

126. Lassiter v. Department of Soc. Servs., 452 U.S. 18, 27 (1981) (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

127. *See* Michael H. v. Gerald D., 491 U.S. 110, 118-19 (1989); Virginia Mixon

Parental rights are limited in at least two circumstances. First, if a parent is declared unfit as defined by state statute, parental rights may be terminated.[128] Procedural protections afforded by the Due Process Clause require notice and a hearing[129] and at least clear and convincing evidence that a parent is unfit[130] before termination of parental rights. Second, courts generally allow only two people to exercise parental rights with respect to any one child.[131]

Swindell, *Children's Participation in Custodial and Parental Right Determinations*, 31 HOUS. L. REV. 659, 679 (1994);

128. *See* Swindell, *supra* note 127, at 680-82. Grounds for termination include "child abuse, abandonment, neglect, dependency, inability to provide care due to incarceration and general unfitness." *Id.* at 682.

129. *See Stanley*, 405 U.S. at 655-57.

130. *See* Santosky v. Kramer, 455 U.S. 745, 758-68 (1982).

131. *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 883 (1984); *see, e.g., Michael H.*, 491 U.S. 110 (recognizing two legal parents and denying rights to the biological father, even though he had a personal relationship with the child); *see also* Cahn, *supra* note 111, at 2 (noting that courts recognize only two legal parents in cases involving surrogacy and unwed fathers).

There are, however, several exceptions to the notion that a parent's control over the child is exclusive. First, based upon the doctrine of *parens patriae* the State may require education at certain ages, require vaccines and limit child labor. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944). Second, all fifty states have enacted legislation giving grandparents the right to visit their grandchildren, but they differ on the circumstances in which visitation rights should be granted. *See* Anne Marie Jackson, *The Coming of Age of Grandparent Visitation Rights*, 43 AM. U. L. REV. 563, 564, 568 (1994). Some state courts have held grandparent visitation statutes unconstitutional. *See* Beagle v. Beagle, 678 So.2d 1271, 1276 (Fla. 1996) (ruling that granting visitation rights to grandparents violates the "parents' fundamental right to raise their children" founded in the Florida Constitution except "where the child is threatened with harm."); Brooks v. Parkerson, 454 S.E.2d 769, 773 (Ga. 1995) (holding that the Georgia Grandparent Visitation Statute impermissibly interfered with parental rights, as guaranteed by the state and federal constitutions, and that visitation must be limited to instances where "failing to do so would be harmful to the child"); Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993) (holding that the Grandparents Visitation Act is unconstitutional under the state constitution and that a showing of harm is necessary before visitation rights may be granted). The U.S. Supreme Court has refused to grant certiorari in two cases that affirmed grandparent visitation rights over the objection of the child's adoptive and biological parents. *See* King v. King, 828 S.W.2d 630 (Ky. 1992) (granting a grandfather visitation rights over the objections of the child's biological parents), *cert. denied*, 506 U.S. 941 (1992); H.F. v. T.F., 483 N.W.2d 803 (Wis. 1992) (granting visitation rights to grandparents despite adoption of the child by the stepfather), *cert. denied*, 506 U.S. 953 (1992). The courts in six other states have also upheld grandparent visitation statutes. *See* Lehrer v. Davis, 571 A.2d 691 (Conn. 1990); Bailey v. Menzie, 542 N.E.2d 1015 (Ind. Ct. App. 1989); Spradling v. Harris, 778 P.2d 365 (Kan. 1989); Herndon v. Tuhey, 857 S.W.2d 203 (Mo. 1993); Ridenour v. Ridenour, 901 P.2d 770 (N.M. Ct. App. 1995); Michael v. Hertzler, 900 P.2d 1144 (Wyo. 1995).

Finally, open adoption serves as an exception to the rule of exclusive parental rights. Open adoption is "the sharing of information and/or contacts between the

b. Aspects of parenthood giving rise to parental rights

In order to determine who a child's legal parents are, courts analyze the different elements of parenthood. Two lower court opinions suggest that motherhood is comprised of genetics, gestation and the social role or intent of the two biological mothers.[132]

In *Johnson v. Calvert*, the court gave great weight to the intent/social element of parental rights when there are two biological mothers of one child.[133] This case involved a dispute between the genetic and gestational mothers, both of whom sought recognition as the child's legal mother.[134] Finding that each mother presented acceptable proof of maternity under California law, the Supreme Court of California held that when the gestational and genetic relationships do not "coincide in one woman, she who intended to . . . bring about the birth of a child that [sic] she intended to raise as her own—is the natural mother."[135] The court reasoned that significant weight should be given to the important role of the in-

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adoptive and biological parents of an adopted child, before and/or after the placement of the child, and perhaps continuing for the life of the child." Marianne Berry, *Risks and Benefits of Open Adoption*, *in* THE FUTURE OF CHILDREN 125, 126 (Richard E. Behrman ed., 1993). Courts in seven states enforce these agreements (California, Delaware, Idaho, Maryland, Massachusetts, New Mexico and Washington). *See* Tammy M. Somogye, *Opening Minds to Open Adoption*, 45 U. KAN. L. REV. 619, 623 (1997). Additionally, eight states allow private open adoption agreements, but do not enforce them (Alabama, Alaska, Colorado, Connecticut, Illinois, Michigan, New Jersey and Tennessee). *See id.* at 622-23. However, open adoptions may not be entirely inconsistent with the notion of exclusive parental control as the adoptive parents consented to contact or information sharing between their child and the biological parent(s) in the adoption agreement. *See id.* at 622.

132. *See* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993); McDonald v. McDonald, 608 N.Y.S.2d 477, 478-80 (Sup. Ct. 1994). *But see* Belsito v. Clark, 644 N.E.2d 760, 766-67 (Ct. C.P. Ohio 1994) (relying only on the genetic factor to determine parental rights).

133. *See* 851 P.2d at 782.

134. *See id.* at 778. A contract existed between the parties which stated that the genetic mother was the intended social mother of the child. *See id.*

135. *Id.* at 782. The intent doctrine established in *Johnson* is contract based. Under this test, the legal parents are those who agreed, prior to the pregnancy, to raise the child. The Uniform Status of Children of Assisted Conception Act, a model statute, also bases motherhood in surrogacy agreements on the intentions of the parties. § 8(a)(1), 9B U.L.A. 206 (West Supp. 1997). Concerns about preventing children from being treated as commodities, the best interests of the child and the exploitation of women led several states to enact statutes governing surrogacy contracts. In Michigan, for example, surrogate contracts for compensation are void. *See* MICH. COMP. LAWS ANN. § 722.859 (West 1993); *see also* Doe v. Attorney Gen., 487 N.W.2d 484, 489 (Mich. Ct. App. 1992) (holding that a surrogate parentage contract for compensation is unlawful).

Despite public policy concerns, this test is the most functional in the absence of legislation because it allows the parties to create a family in a myriad of ways without imposing a legal definition of parenthood that is inconsistent with the contribution (or lack thereof) that the parties wish to make in raising the child.

tending parents in the procreative process when one woman does not provide both gestational and genetic elements: "[W]hile all of the players in the procreative arrangement are necessary in bringing a child into the world, *the child would not have been born but for the efforts of the intended parents* . . . . [T]he intended parents are the first cause, or the prime movers, of the procreative relationship."[136] The court indicated that the creation of the parents' "mental concept of the child" is equated with conception.[137]

Adopting the reasoning of *Johnson*, the Supreme Court of New York, in *McDonald v. McDonald*,[138] held that intent to be the child's social mother is determinative when genetics and gestation do not exist in one woman.[139] Olga McDonald was the gestational and social mother of twins in *McDonald*.[140] In a divorce action, her husband, who was the biological father of the twins, attempted to gain sole custody by arguing that his wife was not their legal mother because she was not genetically related to the twins.[141] The genetic mother of the twins did not seek parental rights. The court recognized Olga McDonald as the legal mother because she intended to raise the children.[142]

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136. *Johnson*, 851 P.2d at 782 (quoting Hill, *supra* note 48, at 415). The court further elaborated that:

> [the Calverts] affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted on intention, the child would not exist. Anna agreed to facilitate the procreation of Mark's and Crispina's child. The parties' aim was to bring Mark's and Crispina's child into the world, not for Mark and Crispina to donate a zygote to Anna. Crispina from the outset intended to be the child's mother. Although the gestative function Anna performed was necessary to bring about the child's birth, it is safe to say that Anna would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother. No reason appears why Anna's later change of heart should vitiate the determination that Crispina is the child's natural mother.

Id.

137. *Id.* at 783.

> The mental concept of the child is a controlling factor of its creation, and the originators of that concept merit full credit as conceivers. The mental concept must be recognized as independently valuable; it creates expectations in the initiating parents of a child, and it creates expectations in society for adequate performance on the part of the initiators as parents of the child.

Id. (quoting Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 196 (1986)).

138. 608 N.Y.S.2d 477 (App. Div. 1994).

139. *See id.* at 480 (finding the *Johnson* court's reasoning to be "persuasive").

140. *See id.* at 478.

141. *See id.* at 478-79.

142. *See id.* at 478.

In *Belsito v. Clark*,[143] the Court of Common Pleas of Ohio rejected the intent-based approach in *Johnson* and adopted a test based solely on the existence of a genetic relationship.[144] In *Belsito*, Shelly Belsito was the intended mother and the genetic mother.[145] Mrs. Belsito and her husband, the biological father, sought a declaratory judgment establishing that they were the legal parents of the child.[146] Carol Clark, the gestational surrogate, did not seek parental rights.[147]

The court held that Mrs. Belsito was the child's legal and biological mother because she provided its genetic material.[148] In supporting its conclusion, the court stated that:

> [T]here is abundant precedent for using the genetics test for identifying a natural parent . . . . The genetic parent can guide the child from experience through the strengths and weaknesses of a common ancestry of genetic traits. Because that test has served so well, it should remain the primary test for determining the natural parent, or parents, in nongenetic-providing surrogacy cases.[149]

Despite this statement, the court failed to explain why a genetic link alone is determinative when genetics and gestation are separated between women. The court neither addressed arguments for using gestation as the determinative factor nor provided reasons for rejecting a gestational standard other than asserting that a genetic standard is superior.[150] The court rejected *Johnson's* intent test partly because it "subordinat[es] the consent of the genetic-providing individual to the intent to procreate of the [gestational] surrogate who intends to keep and raise the child."[151]

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143. 644 N.E.2d 760 (Ct. C.P. Ohio 1994).

144. *See id.* at 766.

145. *See id.* at 761.

146. *See id.* at 762.

147. *See id.* at 767.

148. *See id.* The court explained that the term "natural parent" means that the child and parent share the same blood line. *Id.* at 762. Today the genetic relationship, which is equivalent to a "blood relationship," is evidentiary support in establishing parentage. *See id.* at 763. The court also stated that the gestational parent did not have any parental rights because the gestational parent did not "contribute to the genetics of the child" and the genetic parent did not waive her parental rights. *Id.* at 766.

149. *Id.* The court asserted that the genetic test is already established as the "primary test" for determining maternity when there are two biological mothers. However, it failed to support this assertion.

150. *See id.* at 767 (stating that the genetic parents were the natural parents in cases where an embryo is implanted in the surrogate by means of *in vitro* fertilization).

151. *Id.* at 766. There were two other reasons the *Belsito* court rejected the reasoning of *Johnson*. First, the intent test is difficult to apply because intent can be difficult to prove. *See id.* at 764. Second, the test violates public policy in two

The *Belsito* court emphasized that "the replication of the unique genes of an individual should occur only with the consent of that individual."[152] This statement indicates that the *Belsito* court misunderstood how the *Johnson* intent test determines the legal parent. When there is a surrogacy agreement, the gestational mother's intent never operates to subordinate the consent of the genetic mother because the parties' pre-conception agreement is controlling.[153] In the case of stolen or mistakenly-used reproductive material, however, the genetic parents do not have the opportunity to consent to the use of their genes. Thus, the *Belsito* court's concern that one's genes will be replicated without consent is valid when applied in this context.

These cases illustrate that neither genetics nor gestation alone determines who is the legal mother. Although *Belsito* holds that genetics is determinative, its reasoning is unconvincing. In evaluating the persuasiveness of the court's reasoning, it should be noted that the genetic mother was also the intended mother and the gestational mother did not seek parental rights.[154]

Prior to the focus by state courts on genetics and gestation, the U.S. Supreme Court emphasized the importance of the third aspect of parenthood, the intent/social element.[155] This factor has the most impact when determining whether unwed fathers have parental rights. Several Supreme Court cases addressing the parental rights of unwed fathers combine to form the general principle that if the mother is not married, the biological father may secure constitutional protection of his parental rights by establishing

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ways. *See id.* at 765. Specifically, surrogacy arrangements generally involve one woman surrendering her parental rights by agreement and sometimes for a fee. *See id.* This violates the public policy against surrendering parental rights via private contract. *See id.* The intent test also undermines established adoption laws resulting in a violation of public policy. *See id.* Ohio adoption laws require that the biological mother be given an "unpressured opportunity" to surrender her parental rights, that the child's interests be protected by close supervision of the adoptive process, and that the adoption process promote stability in the adoptive parent-child relationship. *See id.* Finding that the surrogate is similar to an adoptive parent, the court ruled that the intent test does not address the concerns underlying the adoption process. *See id.*

152. *Id.* at 766.

153. *See id.*

154. *See supra* text accompanying notes 145-47.

155. *See* Smith v. Organization of Foster Families for Equal. & Reform, 431 U.S. 816 (1977). "[T]he importance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children, [citation omitted] as well as from the fact of blood relationship." *Id.* at 844 (quoting Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972)).

a relationship with his child.[156] However, if the father fails to establish a personal relationship, then constitutional protection of his parental rights may eventually terminate.[157]

Despite the importance the Court gives to the personal relationship between a father and his child, the Court does not consider the intent/social element if the mother was married to another man when the child was born.[158] In this situation, the Court adopts a bright line rule: the biological father does not have a constitutional right to establish paternity or any parental rights regardless of his relationship with the child.[159] In contrast, the marital status of the mother does not affect her parental rights.[160]

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156. *See* Hill, *supra* note 48, at 375-76. This general rule emerges from an accumulation of several cases. *See id.* (citing Lehr v. Robertson, 463 U.S. 248, 261 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972)); *cf. Lehr*, 463 U.S. at 261 (stating that "the mere existence of a biological link does not merit" the same constitutional protection that would be afforded to a father who established a relationship with his child); *Caban*, 441 U.S. at 392 (explaining that states may allow a child whose parents are unwed to be adopted without the consent of a parent who has not participated in raising the child); *Quilloin*, 434 U.S. at 246 (holding that a state may deny an unwed biological father the authority to oppose the adoption of his child who was born out-of-wedlock if he never supported the 11-year-old child or took steps to legitimize it); *Stanley*, 405 U.S. at 645 (holding that a statute which declared children born out-of-wedlock wards of the state upon the mother's death violates the unwed father's Due Process and Equal Protection rights by presuming the father unfit because his children were born out-of-wedlock).

157. *See* cases cited *supra* note 156; Hill, *supra* note 48, at 376.

158. *See* Michael H. v. Gerald D., 491 U.S. 110, 128-30 (1989).

159. *See id.* In some states, including California, Oklahoma and Oregon, the presumption of legitimacy is irrebuttable. *See* MARTHA A. FIELD, SURROGATE MOTHERHOOD 118-19 nn.12 & 19 (1988). In the majority of states where the presumption of legitimacy is rebuttable, the presumption can only be rebutted by the mother or her husband. *See* Hill, *supra* note 48, at 372-73 (explaining that third parties cannot bring actions to establish paternity).

The principle established in *Michael H.* is generally cited for the proposition that preserving the traditional family outweighs a biological father's parental rights. It also is interpreted as allowing the child's interests to override those of the biological father. *See* Cahn, *supra* note 111, at 32. The latter interpretation is not supported by the Court's decision, however, as no inquiry was made into the best interests of the child.

160. *See* Cahn, *supra* note 111, at 37. Historically, parental rights were affected by marital status. Thus, custody rights of married parents against third party interference were virtually absolute while the rights of unmarried parents were not exclusive. *See id.* at 5.

More recently, in the three cases that determined whether the genetic or gestational mother had parental rights, the courts focused on the distribution of the three elements of parenthood among the mothers. *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); Belsito v. Clark, 644 N.E.2d 760 (Ct. C.P. Ohio 1994); McDonald v. McDonald, 608 N.Y.S.2d 477 (App. Div. 1994). The marital status of the mothers was not considered in those cases. *See Johnson*, 851 P.2d 776; *Belsito*, 644 N.E.2d 760; *McDonald*, 608 N.Y.S.2d 477.

Although in each of those cases the end result was that a traditional family re-

Taken together, these rules stand for the proposition that genetics alone is not determinative of paternal rights and that the existence of a personal relationship is an important factor in determining whether an unwed biological father has parental rights.

Similarly, genetics alone is not determinative of legal maternity.[161] However, genetics and gestation together are determinative. When these two elements exist in one woman, the intent/social element is generally found to be irrelevant.[162] In *In re Baby Girl Clausen*,[163] for example, Michigan's Supreme Court ordered that the prospective adoptive parents, the DeBoers, return the baby girl to her genetic parents because the parental rights of the biological father had not been terminated.[164] The court ordered this even though the child lived with the prospective adoptive parents for more than two years while the litigation proceeded.[165]

Arguing that the child should not be returned to her biological parents, the prospective adoptive parents contended that they had a "protected liberty interest in their relationship" with the baby girl, Jessica.[166] Based upon U.S. Supreme Court cases ad-

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ceived custody of the child, it is not clear from the facts of the cases that the child would not be living in a traditional family had the court given legal parental status to the other mother. Furthermore, the factors that the Supreme Court has relied upon in preserving the child's nuclear family are not relevant in the context of collaborative reproduction. These factors include the state's interest in preserving the marital union and the lack of basis in history and tradition for awarding parental rights to unwed fathers. *See Michael H.*, 491 U.S. at 125-30. The first interest is not implicated in the context of collaborative reproduction because the child is not the product of marital infidelity as she was in *Michael H.*

161. *Cf. Johnson*, 851 P.2d at 782 (relying on the social aspect of parenthood to determine parental rights); *McDonald*, 608 N.Y.S.2d at 479-80 (adopting the reasoning of *Johnson*, 851 P.2d 776).

162. *See, e.g., In re* Baby M., 537 A.2d 1227, 1240 (1988) (holding that the intended mother, who was not the gestational or genetic mother, did not have a valid claim to legal maternity because the surrogacy contract was invalid due to conflicts with existing statutes and public policy); *In re* Moschetta, 30 Cal. Rptr. 2d 893, 894 (Ct. App. 1994) (refusing to recognize a traditional surrogacy contract where the surrogate is the gestational and genetic mother because the court found that intent is irrelevant in the context of traditional surrogacy). These cases demonstrate the intent/social element is generally irrelevant unless the social mother also has a genetic or gestational connection to the child. *But see* Twigg v. Mays, No. 88-4489-CA-01, 1993 WL 330624, at *6, (Fla. Cir. Ct. Aug. 18, 1993) (holding that changing custody of a child from the man who raised her to her biological parents, who took the wrong baby home from the hospital at her birth, would be detrimental to the child).

163. 502 N.W.2d 649 (Mich. 1993).

164. *See id.*

165. *See* Nancy Gibbs et al., *In Whose Best Interest?*, TIME, July 19, 1993 at 44.

166. 502 N.W.2d at 663.

dressing the parental rights of unwed fathers,[167] the prospective adoptive parents argued that it is the relationship which invokes constitutional protection of parental rights rather than the existence of a biological connection.[168]

Rejecting this argument, the Supreme Court of Michigan explained that the cases addressing the rights of unwed fathers provide a justification for denying parental rights to an unwed father.[169] The cases do not establish that third parties obtain parental rights by developing a parental relationship with the child.[170] The U.S. Supreme Court declined to stay the state court order.[171]

Thus, while the existence of a personal relationship with the child can be a significant factor in determining who should be the parent as between different genetic and gestational mothers, raising the child for his or her entire life is not determinative of parenthood by itself. Cases addressing the genetic, gestational and intent/social elements of parenthood suggest that parental rights are derived from all three elements of parenthood and that no single element or combination thereof is sufficient for the attachment of parental rights.

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167. *See id.*; *see also supra* note 156 and accompanying text (describing several cases that establish the principle that an unwed father's parental rights would eventually terminate if he did not establish a personal relationship with his child).

168. *See In re Baby Girl Clausen*, 502 N.W.2d at 663.

169. *See id.* at 664.

170. *See id.* In *In re Kirchner*, a case with strikingly similar facts to the custody dispute of Baby Jessica, the unwed mother of a baby boy gave him up for adoption, but the father was told by the mother's friends and relatives that the child died at birth. *See* 649 N.E.2d 324, 327 (Ill. 1995). The court held that the father's parental rights were not legally terminated; thus the adoption was invalid and the child was given to the father. *See id.* at 328-29, 340. Subsequently, the father moved out after he and his wife separated. *See Father in Custody Crusade Living Away From Family*, WASH. POST, Jan. 21, 1997, at A1.

171. *See* DeBoer v. DeBoer, 509 U.S. 1301, 1303 (1993). The Supreme Court did not speak to the reasoning of the Michigan Supreme Court, however.

II. Analysis of Competing Doctrines for Assigning Parental Rights in the Context of Collaborative Reproduction Without the Genetic Mother's Consent

If the parties involved never reach an agreement as to who should raise the child, how should legal parenthood be defined? When the genetic mother's eggs are used without her consent, the biological parents do not have an understanding of the role each will take in the child's life. In the case of the Jorges, Mrs. Jorge intended to bring a child into the world using her eggs, but she did not intend to allow another woman to contribute to this process.[172] From the outset, however, the gestational parents of the twins, allegedly produced from Mrs. Jorge's eggs, also intended to raise them. Because both biological mothers exhibited the intent/social element, the *Johnson* intent test is inapplicable in this situation.

When there was never one purpose in common between all the mothers, should legal parenthood be based on genetics, gestation, intent, or another factor? The problem with rejecting intent as the determinative factor is that it is the only one of the three elements of parenthood and procreation that does not treat the child as a possession. In searching for a more equitable standard and one which promotes the welfare of children, the best interests of the child standard is the most appropriate.[173]

A. The Genetic Standard

Under the genetic-based test, the parents who are genetically-related to the child are his or her legal parents.[174] Three principal arguments support this test in the context of artificial reproduction without the consent of the genetic mother.[175] The first argument involves the strength of the natural bond between the genetically-related parent and child.[176] Some adopted children, for example, have a strong desire to reunite with their biological parents.[177] This desire exemplifies the power of the genetic

172. *See* Kelleher & Christensen, *supra* note 1, at A1; *supra* notes 1-5 and accompanying text (explaining the circumstances surrounding Mrs. Jorge's unintended egg donation).

173. *See infra* notes 275-79 and accompanying text (reasoning that other standards disserve children as a class as well as the individual child).

174. *See* Schultz, *supra* note 40, at 285.

175. *See* Scott B. Rae, *Parental Rights and the Definition of Motherhood in Surrogate Motherhood*, 3 S. CAL. REV. L. & WOMEN'S STUD. 219, 228-31 (1994).

176. *See id.*

177. *See id.* at 228-29. The reunion of an adoptee and birth parent is an "integral event in" the adoptee's life. ARTHUR D. SOROSKY, THE ADOPTION TRIANGLE 157 (1978). It allows questions about the past to be answered and gives

bond[178] without reducing the impact of the social parents.[179] One court noted the "fact that another person is, literally, developed from a part of oneself can furnish the basis for a profound psychological bond. Heredity can provide a basis of connection between two individuals for the duration of their lives."[180] Thus, proponents argue that if both mothers' claims with respect to the child are equal, the genetic parents should raise the child because bonding between the parent and child is greatly intensified when there is a genetic as well as a social connection.[181]

The second argument in favor of a genetic standard is that the parents' genes determine the "makeup" of the child.[182] Genes are determinative of the child's physical characteristics and traits.[183] Scientific evidence strongly suggests that social practices are predicated on genetics.[184] The argument maintains that the

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the adoptee a "feeling of wholeness." *Id.*

178. *See* Rae, *supra* note 175, at 229.

179. Some proponents of this view argue that if the child does not know his or her identity, then the child will "feel a sense of psychological rootlessness" resulting in "psychological harm." Hill, *supra* note 48, at 403. Predicting that the child's curiosity about his or her biological heritage will affect his or her self-identity, however, confuses the child's concept of his or her self-identity with knowledge of his or her biological heritage. *See id.* at 404.

180. Anna J. v. Mark C., 286 Cal. Rptr. 369, 380-81 (Ct. App. 1991). The similarities between a parent and child provide a unique bond between them. *See* SOROSKY, *supra* note 177, at 159, 171 (recounting the story of a young adoptee elated to hear that her biological mother's voice sounded like "a tape recording of [herself]"). This bond also gives the parent a sense of immortality by passing on a piece of his or her self to descendants. *See* ROBERT J. LIFTON, THE LIFE OF THE SELF 32 (1983).

181. *See* Rae, *supra* note 175, at 229-30; *see also* Hill, *supra* note 48, at 390 (stating that it is natural for law to "preserve as a family unit that which nature has rendered genetically similar").

182. *See* Rae, *supra* note 175, at 228.

183. *See id.*; *see also* Auke Tellegen et al., *Personality Similarity in Twins Reared Apart and Together*, 54 J. PERSONALITY & SOC. PSYCHOL. 1031, 1035-36 (1988) (arguing that genetic diversity attributes to personality differences more than environmental diversity and that a common environment among twins plays a "very modest role in the determination of many personality traits"). *But see* W. MISCHEL, INTRODUCTION TO PERSONALITY 311 (3d ed. 1981) (stating that "[t]hrough social learning, vast differences develop among people in their reactions to most of the stimuli they face in daily life"). One adoptee was amazed at the similarity between himself and his biological mother:

> Here, we had been reared in totally different worlds. She: Latin, in a farm community, from working-class people, never having left the state. I: British-raised all over the world, nannies, boarding schools, etc. Yet, we were so alike. We laughed the same, we walked the same, and we had the same mannerisms. We even crossed our legs the same way when we sat down, and we raised our eyebrows in a similar way.

SOROSKY, *supra* note 177, at 174-75.

184. *See* Hill, *supra* note 48, at 390. "Psychological dispositions and personal proclivities," such as spousal preference and occupational choice, may be at least partially determined by genetics. *Id.* If "physical processes which underlie psy-

gestational mother's prenatal contribution is caring for and feeding the child during pregnancy.[185] The argument assumes that the child's physical features would be exactly the same irrespective of the gestator.[186] Because genetics is so determinative of the identity of the child, proponents of this argument contend that it should be the standard for determining maternity.[187]

However, the fact that the child shares the genes of her parents is, by itself, an insufficient factor on which to base parental rights for two reasons.[188] First, this theory would give siblings parental rights over each other.[189] This counterargument, however, fails to address the fact that a child is a part of his or her parents in a way that he or she is not a part of his or her siblings in that a child is not created *from* the siblings' genetic material.[190] Second,

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chological functioning" are inheritable, "a child with a psychological propensity toward learning may be reinforced in her pursuits by a mother with a similar disposition." *Id.* at 390 n.200.

185. *See* Rae, *supra* note 175, at 228. Proponents of the gestation standard argue that the genetic test should be rejected because it devalues the contribution of the gestational mother. *See* Coleman, *supra* note 16, at 517; *see also* BARBARA K. ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 36-37 (1989) (reviewing the historical place of women as mothers).

> The old patriarchal kinship system had a clear place for women: they were the nurturers of men's seeds, the soil in which seeds grew, the daughters who bore men offspring. When forced to acknowledge that a woman's genetic contribution is equal to a man's, Western patriarchy was in trouble. *But the central concept of patriarchy, the importance of the seed, was retained by extending the concept to women.* . . .
>
> . . . Women do not gain their rights to their children in this society as *mothers*, but as *father equivalents*, as equivalent sources of seed.

Id. In her dissenting opinion in *Johnson v. Calvert*, Justice Kennard recognized that:

> [a] pregnant woman's commitment to the unborn child she carries is not just physical; it is psychological and emotional as well . . . . [She is] more than a mere container or breeding animal; she is a conscious agent of creation no less than the genetic mother, and her humanity is implicated on a deep level. Her role should not be devalued.

851 P.2d 776, 797-98 (Cal. 1993).

186. *See* Rae, *supra* note 175, at 228. This assumption is untrue, however, because the gestational mother could have a negative impact on the child's physical appearance and bodily functions if the mother consumes substances such as tobacco, alcohol or drugs. *See id.* at 237.

187. *See id.* at 228.

188. *See* Hill, *supra* note 48, at 391. Basing parenthood on the genetic relationship alone would confer parental rights to a rapist in cases where a child is born. *See* Victoria L. Fergus, *An Interpretation of Ohio Law on Maternal Status in Gestational Surrogacy Disputes:* Belsito v. Clark, 21 U. DAYTON L. REV. 229, 241 (1994). This point can be dismissed, however, if rape is considered a circumstance that prohibits the attachment of parental rights or if maternity is defined differently than paternity.

189. *See* Hill, *supra* note 48, at 391.

190. The discussion on property rights in one's genetic material addresses

the physical act of providing the sperm or ovum does not strengthen the claim to parental rights.[191] Although sperm donors are generally denied parental rights, donating an egg requires more "physical involvement and risk."[192] Arguing that the mother should have parental rights because of her ovum donation, however, is basing the claim on physiological and physical involvement, rather than genetic contribution alone, and it is essentially a claim that her contribution to the child's development creates a property right in the child.[193]

The third argument supporting the genetic-based test is one of property rights. Under this argument, one possesses property rights in the products of one's body and in anything derived therefrom.[194] The argument maintains that because a baby is a product of a person's egg or sperm, the provider of the reproductive material has property or quasi-property rights in the resulting child.[195] Although no cases have addressed the issue of property rights in sperm or ova maturing into parental rights, three cases have dealt with property rights in reproductive material.

In *York v. Jones*, the Yorks requested that the Jones Institute transfer their frozen embryo to California and the institute refused.[196] The District Court for the Eastern District of Virginia held that the cryopreservation agreement "created a bailor-bailee relationship between the plaintiffs and defendants,"[197] implying that the Yorks had a property right in the frozen embryo.[198]

In *Davis v. Davis*, a divorced couple fought over the custody of their seven frozen embryos.[199] The Supreme Court of Tennessee held that "preembryos are not, strictly speaking, either 'persons' or

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whether such rights translate into parental rights over the resulting child. *See infra* text accompanying notes 194-95.

191. *See* Hill, *supra* note 48, at 390-91.

192. *Id.* at 390. Drugs that induce superovulation which facilitates egg retrieval cause serious side effects including swelling, nausea, diarrhea, stomachaches and weight gain. *See Developments in the Law, supra* note 40, at 1540 n.99. There are also risks of overstimulation and burst ovaries and possible death. *See id.*

193. *See* Hill, *supra* note 48, at 390-91. If the basis for determining parenthood is physical involvement, the gestational mother has a greater claim than the genetic mother.

194. *See* Hill, *supra* note 48, at 391.

195. *See id.*

196. *See* 717 F. Supp. 421, 424 (E.D. Va. 1989).

197. A bailor is a "party who . . . delivers goods to another party who holds them in trust for the bailor." BLACK'S, *supra* note 119, at 141-42.

198. *York*, 717 F. Supp. at 425. The court did not address whether individuals possess property rights in ova or sperm. Thus, this decision is limited to property rights in embryos.

199. *See* 842 S.W.2d 588 (Tenn. 1992).

'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."[200] The couple does not have a "true property interest"[201] in the embryos, but "they do have an interest in the nature of ownership to the extent that they have decision-making authority concerning disposition of the preembryos."[202]

In *Hecht v. Superior Court*, the California Supreme Court relied on *Davis* to hold that the sperm depositor "had an interest, in the nature of ownership, to the extent that he had decision making authority as to the use of his sperm for reproduction."[203] Under the California Probate Code, this interest fit into the definition of property,[204] but in other states, it may not be a property interest depending on the language of applicable statutes.[205]

In *York*, the property interest existed in the gamete donors-bailors as against the clinic-bailee.[206] It is not clear that the court would find parental rights in the genetic parents, derived from their property interest in the embryo, as parents cannot possess a property right in children because "children are not property."[207] They are people. In the holdings of *Davis* and *Hecht*, the gamete provider, at the least, has decision-making authority. To claim that such authority translates into parental rights with respect to the resulting child is a tenuous argument. Although producing a child from a woman's ovum without her consent is a violation of her procreational autonomy,[208] declaring the genetic mother to be the legal mother is not necessarily the appropriate remedy.

If the genetic mother's only cause of action with respect to the child is for a violation of her decision-making authority over the ovum or embryo, then she is most likely limited to one of two

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200. *Id.* at 597.

201. *Id.* Those arguing that the embryo is property take the view that it "has a status no different from any other human tissue. With the consent of those who have decision-making authority over the preembryo, no limits should be imposed on actions taken with preembryos." *Id.* at 596 (quoting *Report of the Ethics Committee of the American Fertility Society*, 53 J. AM. FERTILITY SOC'Y, 34S-35S (1990)).

202. *Id.* at 597.

203. 20 Cal.Rptr.2d 275, 283 (1993).

204. *See id.*

205. *See* Jennifer Long Collins, Hecht v. Superior Court: *Recognizing a Property Right in Reproductive Material*, 33 U. LOUISVILLE J. FAM. L. 661, 670 (1995).

206. *See id.* at 669.

207. Hill, *supra* note 48, at 392.

208. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing the right, among married couples, to avoid procreating); Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977) (finding that the decision whether or not to beget or bear a child is fundamental to individual autonomy).

strategies. The first is an action for conversion against the clinic or physician.[209] The second is an argument that the strength of the bond between the genetic parent and child warrants granting custody to the genetic parents.[210]

B. The Gestational Standard

At common law, giving birth gives rise to a presumption of motherhood.[211] This presumption is based on the ancient dictum, *mater est quam demonstrate,* which means by gestation the mother is demonstrated.[212] It is possible, however, that consanguinity is the basis for parental rights in the common law and that gestation was merely evidence of shared genes.[213] Accordingly, blood tests are an acceptable method of determining maternity.[214] Because artificial reproduction was extremely rare when the common law

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209. Under this argument, the ovum or embryo is a chattel:

> (1) Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.
>
> (2) in determining the seriousness of the interference and the justice of requiring the actor to pay the full value, the following factors are important:
>
> (a) the extent and duration of the actor's exercise of dominion or control;
>
> (b) the actor's intent to assert a right in fact inconsistent with the other's right of control;
>
> (c) the actor's good faith;
>
> (d) the extent and duration of the resulting interference with the other's right of control;
>
> (e) the harm done to the chattel;
>
> (f) the inconvenience and expense caused to the other.

RESTATEMENT (SECOND) OF TORTS § 222A (1965).

> One who is authorized to make a particular use of a chattel, and uses it in a manner exceeding the authorization, is subject to liability for conversion to another whose right to control the use of the chattel is thereby seriously violated.

Id. § 228.

The doctrine of accession does not apply in the case of stolen reproductive material because the property must be taken in good faith or by innocent mistake for the doctrine to apply. *See* Hill, *supra* note 48, at 392 n.209 (citation omitted). Under that doctrine, the title of the chattel passes to the laborer when he substantially changes or increases the value of the chattel, regardless of the original owner's consent to the labor. *See* Wetherbee v. Green, 22 Mich. 311 (Mich. 1871).

210. *See supra* notes 176-81 and accompanying text (presenting argument involving the strength of the natural bond between the genetically-related parent and child).

211. *See* Coleman, *supra* note 16, at 524.

212. *See* Johnson v. Calvert, 851 P.2d 776, 781 (Cal. 1993).

213. *See id.* at 781-82.

214. *See* UNIF. PARENTAGE ACT §§ 12, 21, 9B U.L.A. 317 (1987).

rule developed, courts most likely did not find it important to clarify the rationale behind this rule.

Scholars present four main arguments for using gestation as the defining factor of maternity. First, the gestational mother devotes much more of herself, physically and emotionally, to the child by the time the child is born than the genetic mother.[215] Second, research indicates that the gestational mother contributes to the child's physical, psychological and emotional development during pregnancy.[216] Two researchers, in separate studies, noted that mothers looking forward to the birth gave birth to children who were significantly healthier, both emotionally and physically, than babies born to mothers who were not.[217] One study found that babies of women who were under severe stress during pregnancy have "gastro-intestinal problems, cry frequently, and are perceived as having a difficult temperament."[218] Gestational mothers can also take affirmative steps to positively influence the child's development.[219] Researchers are uncertain whether prenatal teaching impacts the specific behavior of the child or whether it affects the overall disposition of the child, but they are certain that prenatal experiences do affect the child.[220] This evidence demon-

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215. *See* Rae, *supra* note 175, at 236-37 (stating that carrying the child for nine months and giving birth establishes a "sweat equity" in the child).

216. *See id.* at 237-42 (noting that the gestational mother contributes to the "emotional makeup, temperament, and dispositions of the child, and in some cases . . . to the child's physical form" which can be a negative contribution due to the consumption of tobacco, alcohol, or drugs).

217. *See* THOMAS VERNY, M.D. & JOHN KELLY, THE SECRET LIFE OF THE UNBORN CHILD, 47, 47-48 (1981). The 2000 women studied were from similar socio-economic backgrounds, received similar prenatal care, and were of similar intelligence levels. *See id.* The only significant difference among the women was their attitude toward the pregnancy. *See id.*

In Dr. Gerhard Rottman's study of 141 women, the healthiest babies were born to mothers who wanted them both consciously and subconsciously. *See id.* at 48-49 (citing Gerhard Rottman, UNTERSUCHUNGEN UBER EINSTELLUNG ZUR SCHWANGERSCHAFT UND ZUR FOTALEN ENTWICKLUNG, *in* GEIST UND PSYCHE (Hans Graber ed., 1974)). By contrast, women with strong negative feelings toward the pregnancy had a greater percentage of premature and low birth weight children who exhibited inclinations toward emotional problems. *See id.* Women who had a desire to have children at some point in their lives, but for whom the pregnancy was untimely due to concerns such as the mother's career or finances, gave birth to an uncommonly large number of lethargic and apathetic children. *See id.*

218. B.R.H. Van den Bergh, Ph.D., *The Influence of Maternal Emotions During Pregnancy on Fetal and Neonatal Behavior*, 5 PRE- & PERI-NATAL PSYCHOL. 119, 127 (1990). The study was conducted by B.R.H. Van den Burgh, Ph.D., of the Center for Developmental Psychology at the University of Leuvan, Belgium. *See id.* at 119.

219. *See* Rae, *supra* note 175, at 240-41.

220. *See* Peter Hepper, *Fetal Learning: Implications for Psychiatry*, 155 BRIT. J. PSYCHIATRY 289, 292 (1989).

strates that the gestational mother's contribution is not limited to the role of an incubator.

These arguments resemble the genetic progenitor's claim that property rights in gametes translate into parental rights over the child.[221] Essentially, the gestational mother is claiming that her contribution to the child's development creates a property right in the child.[222] Thus, although the gestational mother has more physical involvement with the child than the genetic mother, such a claim fails because one cannot possess property rights in a child.[223]

The third argument for utilizing gestation as the standard for finding maternity involves the mother-infant bond and the infant-mother bond. In some situtations, the mother's bond to the infant develops as early as the end of the third month of pregnancy,[224] but research indicates that this bond does not always occur during pregnancy.[225] Because the mother-infant bond is not an immutable aspect of pregnancy, the argument for using gestation as the standard is weakened.[226]

It is critical to the child's development throughout life that he or she form a bond with an adult at a very early stage in life.[227] There is no evidence indicating that the child must form this bond with the gestational mother, however. Studies indicate that there is no significant variation in the quality of the bond between adoptive and biological parent-child relationships.[228] Thus, the gesta-

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221. *See* Hill, *supra* note 48, at 408-09; *supra* text accompanying note 195.

222. *See* Hill, *supra* note 48, at 408-09.

223. *See supra* text accompanying note 207 (explaining that parents have no property rights in children).

224. *See* John C. Fletcher & Mark I. Evans, *Maternal Bonding in Early Fetal Ultrasound Examinations*, 308 NEW ENG. J. MED. 392, 392 (1983).

225. *See* Kennel & Klaus, *Mother-Infant Bonding: Weighing the Evidence*, 4 DEV. REV. 275, 281 (1984). In a study of 97 new mothers, 41% first felt love for their babies during pregnancy, 24% first felt love at birth and 8% first felt love after the baby was a week old. *See id.*

226. *See* Hill, *supra* note 48, at 398.

227. Infants who do not form a bond with an adult will likely have difficulties in establishing "deep and enduring relationships later in life." *See* Hill, *supra* note 48, at 402; Leslie M. Singer et al., *Mother-Infant Attachment in Adoptive Families*, 56 CHILD DEV. 1543, 1544 (1985) (noting prior research of nonadoptive families that indicates "a secure, emotional attachment to care givers . . . is important for healthy psychological adjustment . . . in later childhood"). Infants generally begin to form bonds around the age of three months. *See* L.J. Yarrow & M.S. Goodwin, *The Immediate Impact of Separation: Reactions of Infants to a Change in Mother Figure*, *in* THE COMPETENT INFANT: RESEARCH AND COMMENTARY, 1032, 1036-39 (Lawrence Joseph Stone et al. eds., 1973) (study of adopted infants indicated that before three months few infants react to changes in their environment).

228. *See* Hill, *supra* note 48, at 402; Singer, *supra* note 227, at 1547.

tional mother's claim that she is a more appropriate mother because of her ability to bond with the child[229] or the child's ability to bond with her is ill-founded.[230]

The fourth argument for utilizing gestation as the standard for maternity involves the gestational mother's emotional ties to the child. When a mother is permanently separated from her child she may experience "a deep sense of loss which pervades daily activities."[231] It does not follow, however, that the gestational mother should be given priority on the basis of potential psychological harm occasioned by the relinquishment of her child.[232] The genetic mother may suffer psychologically as well, even if she has not seen the child.[233] Thus, the fact that the gestational mother will undergo psychological trauma is a tenuous argument upon which to base a claim to parental rights.

C. Best Interests of the Child Standard

The interests of the father and each mother, whether gestational or genetic, are important. Each person's contribution is essential to bring the child into the world. Nevertheless, the child's interests should not be subverted. Yet, under the tests previously discussed, the child's interests are not considered. Under the best interests of the child standard, however, the interests of the parents are limited by their effect on the child.[234] In cases where reproductive material was stolen or mistakenly used, the interests of the resulting child should be paramount rather than focusing exclusively on the rights of the competing mothers.[235] A proper ap-

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229. If the ability of the mother to adequately bond with the child is not dependent on gestating the child, then genetic and adoptive mothers have the same propensity to bond with the child as the gestational mother. *See* Singer, *supra* note 227, at 1550 (stating that "there is little reason to believe [adoptive parents'] attachment relationships with their young infants will differ markedly from nonadoptive parents").

230. *See* Hill, *supra* note 48, at 400, 403.

231. Hill, *supra* note 48, at 405.

232. *See id.* at 407.

233. *Cf.* Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (recognizing Mr. Davis' concern that if the preembryos created with his sperm were donated to another couple, "he would face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it").

234. *See supra* note 76 (stating that parental rights must be tempered by the repercussions on the children involved).

235. *See* Douglas S. Irwin, *Maternity Blues: What About the Best Interests of the Child in* Johnson v. Calvert*?*, 24 SW. U. L. REV. 1277, 1292 (1995). "The child is an innocent party, and his or her needs and concerns should prevail over those who brought him or her into existence, regardless of any claims those individuals claiming priority might have." *Id.*

plication of the standard focuses solely on the interests of the child.[236]

The most common application of the best interests of the child standard is in resolving custody disputes.[237] In these cases, the legal parents are already identified; the issue is how the parental rights should be divided among them. The best interests standard is rarely used to determine which people possess parental rights,[238] which is an issue separate from determining the rights possessed by a person who is already recognized as a parent.

In making a custody decision, the Supreme Court of Alabama provided a comprehensive list of the pertinent factors of the best interests of the child standard:

> The . . . age of the children . . . the characteristics and needs of each child, including their emotional, social, moral, material and educational needs; the respective home environments offered by the parties; the characteristics of those seeking custody; including age, character, stability, mental and physical health; the capacity and interest of each parent to provide for emotional, social, moral, material and educational needs of the children; the interpersonal relationship between each child and each parent; the interpersonal relationship between the children; the effect on the child of disrupting or continuing an existing custodial status; the preference of each child, if the child is of sufficient age and maturity; the report and recommendation of any expert witnesses or other independent investigator; available alternatives; and any other relevant matter the evidence may disclose.[239]

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236. *See* Suzette M. Haynie, *Biological Parents v. Third Parties: Whose Right to Child Custody is Constitutionally Protected?*, 20 GA. L. REV. 705, 721 (1986). "[C]ourts frequently allow [the child's best interests] to be diluted by other considerations that reflect the interests of one or both parents or the state." Younger, *supra* note 115, at 516.

237. All states currently apply a best interests standard to resolve custody disputes between divorced or separated parents. *See* Rene R. Gilliam, *When a Surrogate Mother Breaks a Promise: The Inappropriateness of the Traditional "Best Interests of the Child" Standard*, 18 MEM. ST. U. L. REV. 514, 518 (1988). A few states apply this standard to adjudicate custody disputes between biological parents and third parties. *See* R.A.D. v. M.E.Z., 414 A.2d 211 (Del. Super. Ct. 1980); Costigan v. Costigan, 418 A.2d 1144 (Me. 1980); Stanley D. v. Deborah D., 467 A.2d 249 (N.H. 1983); Patzer v. Glaser, 368 N.W.2d 561 (N.D. 1985); Elm v. Key, 480 P.2d 104 (Wyo. 1971). At least one court used the best interests of the child standard to determine the custody of a child in a dispute between a traditional surrogate mother and the child's biological father. *See In re* Baby M., 537 A.2d 1227 (N.J. 1987).

238. *See infra* note 245 (identifying courts that declined to use this standard in cases involving parental rights). *But see* Twigg v. Mays, No. 88-4489-CA-01, 1993 WL 330624, at *6 (Fla. Cir. Ct. Aug. 18, 1993) (applying the best interests of the child standard in holding that biological parents did not have any parental rights).

239. *Ex parte* Divine, 398 So.2d 686, 696-97 (Ala. 1981).

This standard's copious factors allow for much judicial discretion. Critics of this test argue that it is "arbitrary, vague and overreaching."[240] They further contend that "the tendency . . . is to apply intuition in deciding that a child would be 'better' with one set of parents than with another, and then to express this intuitive feeling in terms of the legal standard of being 'in the best interests of the child.'"[241] Scholars have proposed variations of this standard,[242] but these variations are just as indeterminate as the best interests standard.[243] For lack of a better alternative, courts continue to apply the best interests of the child standard to custody disputes.

In custody disputes between biological parents, each parent has an equal claim to custody, and courts apply the best interests of the child standard to assign custody.[244] Where the suit is between a biological parent and a third party, courts rarely examine the best interests of the child unless the biological parent is found to be unfit.[245] Thus, in that situation, the biological parent's con-

240. Gloria Christopherson, *Minnesota Developments, Minnesota Adopts a Best Interests Standard in Parental Rights Termination Proceedings:* In re J.J.B., 71 MINN. L. REV. 1263, 1272 (1987) (citations omitted); *see* Elizabeth P. Miller, DeBoer v. Schmidt *and* Twigg v. Mays*: Does the "Best Interests of the Child" Standard Protect the Best Interests of Children?*, 20 J. CONTEMP. L. 497, 509 (1994) (questioning the efficacy of the best interests of the child standard). Many state statutes do not specify factors to be considered in determining the child's best interests. *See* Christopherson, *supra*, at 1272.

241. State *ex rel.* Lewis v. Lutheran Soc. Servs., 207 N.W.2d 826, 831 (Wis. 1973).

242. Under the "least detrimental alternative" standard, the focus of the court's inquiry is on the child's need for stable and continuous relationships and the child's sense of time "based on the urgency of the instinctual and emotional needs." JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 40, 53 (1979). This standard professes to consider "the law's incapacity to supervise interpersonal relationships and the limits of knowledge to make long-range predictions." *Id.* at 49.

Alternatively, characterizing the child's interest as a right to be nurtured may help in identifying the values that are important in choosing the appropriate person to whom to grant custody. *See* Cahn, *supra* note 111, at 57.

243. "What is psychologically least detrimental will usually be no more determinate for expert and nonexpert alike than what is in a child's best interests; and to reframe the question in a way that invites predictions based on the use of labels and terminology developed for treatment is both demeaning to the expert and corrupting for the judicial process." Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 287 (1975).

244. *See* Cahn, *supra* note 111, at 9-10; Swindell, *supra* note 127, at 675.

245. *See* Swindell, *supra* note 127, at 676; *see, e.g., In re* Clausen, 502 N.W.2d 649, 666 (Mich. 1993) (refusing to consider the interests of the child because there was no showing that the biological parents were unfit). A few states use the best interests doctrine to determine custody in disputes between legal parents and third parties. *See supra* note 237 (citing various jurisdictions that use the best in-

stitutional rights regarding parenting prevail over any interests the child may have in the custody dispute.

Although children have some constitutional rights,[246] those rights are limited. In family law, children's rights are generally defined indirectly through prohibitions on parental behavior or on a recognition of the child's dependence;[247] such rights include the right to adequate physical care, education and protection from harm inflicted by a child's parent.[248]

Michael H. v. Gerald D.[249] established that the rights of a child do not include a liberty interest in maintaining a filial relationship with a biological parent who is not the child's legal parent.[250] The *Michael H.* Court concluded that the daughter of an unwed father, whose mother was married to another man, did not have a constitutionally-protected interest in maintaining a filial relationship with her biological father.[251] The Court explained that to grant her claim would mean that she would have two legally-recognized fathers because the Court held that her mother's husband was her legal father.[252] Her Due Process claim failed because a child cannot have two legally-recognized fathers.[253]

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terests doctrine in custody disputes between legal parents and third parties).

Under the parental-rights doctrine, a fit parent "has a right to the custody, care, and companionship of his or her child even if the interests of the child would be better served by being placed with a third party." Hill, *supra* note 48, at 363. The majority of state courts follow the presumption of the Supreme Court that parents act in the best interests of their children. *See* Miller, *supra* note 240, at 512; *see also* Parham v. J.R., 442 U.S. 584, 602-03 (1979) (recognizing a presumption that parents act in the best interests of their children); *cf. In re* J.P., 648 P.2d 1364 (Utah 1982) (finding unconstitutional an application of the best interests of the child standard in terminating parental rights). Children's interests, however, often conflict with those of their parents. *See* Miller, *supra* note 240, at 510.

246. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622 (1979) (holding that a child may be required to seek the consent of a court, but not of her parents, to obtain an abortion); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (holding that the right to use contraceptives applies to children); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (extending the protection of the First Amendment to children); *In re* Gault, 387 U.S. 1 (1967) (holding that a child must be provided with the basic Due Process protections available to adult criminal defendants if the court proceeding may result in the child's confinement).

247. *See* VINCENT DE FRANCIS, TERMINATION OF PARENTAL RIGHTS: BALANCING THE EQUITIES 9 (1971).

248. *See id.*

249. 491 U.S. 110 (1988).

250. *See id.* at 130-31.

251. *See id.* The child brought an Equal Protection challenge in addition to her Due Process claim. *See id.* at 131. Applying the rational basis test, the Court denied her Equal Protection challenge. *See id.*

252. *See id.*

253. *See id.* There is no basis in history or tradition for the contention that a child may have two fathers. *See id.; supra* text accompanying notes 250-51 (stating that a child does not have a liberty interest in having both a biological and

Despite the Court's failure to consider the child's interests in assigning paternal rights in *Michael H.*, it did not hold that a child's interests cannot be used in the determination of a child's legal parents. Rather, its rationale in making the determination of paternal parentage was grounded in the state's interest in protecting the marital unit.[254] This interest is not implicated in the context of collaborative reproduction as it was in *Michael H.* where the child was the product of marital infidelity.[255] Thus, in the context of collaborative reproduction, *Michael H.* does not foreclose consideration of the child's interests in assigning parental rights.

In *Quilloin v. Walcott*,[256] the trial court applied the best interests standard in deciding that an unwed father did not have parental rights. The U.S. Supreme Court upheld the application of the best interests standard to determine paternity.[257] Determining maternity when there are two biological mothers is similar to determining paternity when the father is unwed because in both situations the parents may not possess all of the elements of parenthood.[258] Therefore, applying the best interests standard to determine legal maternity is consistent with *Quilloin*.

In a dissenting opinion in *Johnson*, Justice Kennard argued that the best interests of the child test should be the standard for determining maternity in the context of collaborative reproduction.[259] The majority rejected this standard, arguing its application is unauthorized "governmental interference" into private matters and "confuses concepts of parentage and custody."[260]

Justice Kennard countered the majority's first argument by emphasizing that when the court grants review to determine who is the legal mother, it puts itself in the center of the controversy.[261] In response to the majority's second point, she argued that the best interests of the child standard is the most appropriate standard for determining parentage in the context of collaborative reproduc-

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a legal father).

254. *See Michael H.*, 491 U.S. at 131.

255. *See id.*

256. 434 U.S. 246 (1978).

257. *See id.* at 254.

258. *Compare supra* notes 103-05 and accompanying text (describing the three elements of motherhood) *with supra* notes 156-59 and accompanying text (explaining that the two elements of fatherhood are biology and personal relationship).

259. *See* 851 P.2d 776, 799 (Cal. 1993) (Kennard, J., dissenting).

260. *Id.* at 782 n.10.

261. *Id.* at 799 n.4 (Kennard, J., dissenting) ("Judicial resolution of family law matters, by its nature, necessarily involves some governmental interference in what would otherwise be private concerns.").

tion.[262] This is because the distribution of parental rights and duties affects the child's welfare and the best interests standard is frequently applied when the child's welfare is at issue.[263] Finally, Justice Kennard noted that the majority did not explain why the best interests standard is inappropriate for the determination of maternal parentage.[264]

In applying the best interests standard, depending on the age of the child,[265] the bond that the child has developed with the family with whom he or she is living is more important in the context of collaborative reproduction than in the context of divorce. It is essentially adoption when a child of collaborative reproduction must leave his or her home and move in with parents who are complete strangers. Adopted children are at a greater risk of experiencing "emotional, behavioral, and educational problems" than non-adopted children.[266] Regardless of which parent gets custody

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262. *See id.* at 799 (Kennard, J., dissenting). One major counterargument to applying this test in the case of a surrogate arrangement involves the financial resources of the parties. Surrogates are frequently less wealthy than the genetic parents and financial well-being may be a significant determinant in one's ability to provide for the child. *See* Irwin, *supra* note 235, at 1291. In the context of collaborative reproduction and misappropriated ova or embryos, however, neither the genetic nor gestational mother is consistently wealthier than the other. Thus, it is doubtful that this factor will consistently work against one of the biological mothers as it does a surrogate. Additionally, other factors not as dependent upon wealth will be considered under this standard; specifically, the ability to physically and psychologically nurture the child, to provide ethical and intellectual guidance and to provide stability and continuity will be considered. *See Johnson*, 851 P.2d at 800 (Kennard, J., dissenting).

263. *See Johnson*, 851 P.2d at 799 (Kennard, J., dissenting).

264. *See id.* at 799 n.4.

265. The degree of the harm the child suffers will likely be a function of his or her age at the time he or she is removed from the home to live with an unknown family. *See* ANU R. SHARMA ET AL., *The Emotional and Behavioral Adjustment of United States Adopted Adolescents: Part II. Age at Adoption, in* 18 CHILDREN AND YOUTH SERVICES REVIEW 101, 110 (1996) (finding that "as age [of the child] at adoption increases, behavioral and emotional adjustment of adoptees decreases"); *see also id.* (noting that "adoption of a child anywhere in the age range of 2-10 years will yield relatively the same levels of psychological adjustment in adolescence").

266. *See* David M. Brodzinsky et al., *Psychological and Academic Adjustment in Adopted Children*, 52 J. CONSULTING AND CLINICAL PSYCHOL. 582, 587 (1984); *see also* David M. Brodzinsky et al., *Prevalence of Clinically Significant Symptomatology in a Nonclinical Sample of Adopted and Nonadopted Children*, 16 J. CLINICAL CHILD PSYCHOLOGY 350, 353 (1987) (finding an "increased psychological risk associated with adoption" and noting that "[a]doptees are especially vulnerable in areas related to externalizing symptomatology (e.g. hyperactivity and aggression)"); Sotiris Kotsopoulos et al., *Psychiatric Disorders in Adopted Children: A Controlled Study*, 58 AM. J. ORTHOPSYCHIATRY 608, 610 (1988) (noting that "the rate of referral to child psychiatric services is higher for adopted than for nonadopted children and adolescents"); Byron W. Lindholm & John Touliatos, *Psychological Adjustment of Adopted and Nonadopted Children*, 46 PSYCHOL. REPORTS 307, 307 (finding

of the child, the child of divorce will probably experience less stress[267] than the child of collaborative reproduction who is "adopted."[268] While no studies directly support this conclusion, it is a logical one because the child of collaborative reproduction, unlike the child of divorce, is not likely to have an existing relationship with the parent(s) with whom he or she may live.

III. Discussion

Procreative rights provide a vague standard for defining who is a procreator. Even if collaborative reproduction falls within the right to procreate, as can be argued from the vague wording of *Carey v. Population Services International*,[269] this right does not

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greater "frequency of disorder, especially conduct problems but also personality problems and socialized delinquency" among adopted children compared to nonadopted children); Ellen L. Lipman et al., *Psychiatric Disorders in Adopted Children: A Profile from the Ontario Child Health Study*, 37 CANADIAN J. PSYCHIATRY 627, 632 (1992) ("Adoption is a significant marker for psychiatric disorder and poor school performance in boys. Adoption in girls 12 to 16 years old is a significant marker for substance abuse."). *But cf.* M. Bohman & S. Sigvardsson, *A Prospective, Longitudinal Study of Children Registered for Adoption*, 61 ACTA PSYCHIATRICA SCANDINAVICA 339, 354 (1980) ("Our results indicate that the risks concerning the subsequent development of adopted children are in no way greater than the risks for children in the general population, provided that the adoptive homes are of a good standard and well prepared for the task of rearing a nonbiological child."); James K. Mikawa & John A. Boston, Jr., *Psychological Characteristics of Adopted Children*, 42 PSYCHIATRIC Q. SUPP. 274, 278 (1968) (concluding that "adoption itself does not necessarily result in systematic changes in personality structure").

267. When a child's parents divorce, the child may suffer many negative effects including feelings of unhappiness, anger and rejection, poor school performance, psychological illness, a greater tendency to commit crime, suicidal thoughts, an increased likelihood of being the father or mother of a child born out of wedlock, negative effects on adult work performance and difficulty in trusting others and in forming stable, lasting relationships. *See* ANN MITCHELL, CHILDREN IN THE MIDDLE: LIVING THROUGH DIVORCE 88-96 (1985); William A. Galston, *Braking Divorce for the Sake of Children*, AM. ENTERPRISE, May/June 1996, at 36. *But see* Lyn Taylor et al., *Parental Divorce and Its Effects on the Quality of Intimate Relationships in Adulthood*, 24 J. DIVORCE & REMARRIAGE 181, 199 (1995) (concluding from a study of 146 adults from divorced and intact families that "parental divorce of itself does not necessarily increase the chance of poor quality intimate relationships in adulthood . . . when parental divorce is not significantly associated with any decrement in maternal care"). Some studies indicate that not all children are significantly affected by divorce. *See, e.g.* Karl Zinmeister, *Divorce's Toll on Children*, AM. ENTERPRISE, May/June 1996, at 39, 41 (discussing a study which concluded that three out of 16 children were unchanged by divorce).

268. The stress that a child undergoes in a divorce may be different than the stress a child experiences when he or she is removed from both parents and possibly all familiar surroundings, such as school and friends. Nonetheless, common sense suggests that there is a greater potential that a child in the latter situation will undergo more stress than a child in the former situation regardless of whether the impact of that stress is long term.

269. 431 U.S. 678 (1977); *see supra* text accompanying note 96 (suggesting that

provide clear standards for determining which participants are procreators.

First, collaborative reproduction extends the normal ideas of artificial reproduction. *In re Baby M.* is an example of the most traditional method of artificial reproduction: artificial insemination. The *Baby M.* court stated that a surrogate, who was artificially inseminated, exercised the right to procreate.[270] Whether the right to procreate also protects collaborative reproduction, which further extends ideas of reproduction in that it involves the gametes of two people and the womb of a third,[271] has not been addressed by the courts.[272]

If collaborative reproduction is part of the right to procreate, several complicated issues arise. Whether the right to procreate would attach to one or all of the participants in collaborative reproduction is unclear. Additionally, *Baby M.* and scholars suggest that at least some parental rights flow from the right to procreate.[273] Conflict is inevitable if two or more participants of collaborative reproduction are procreators, and they attempt to exercise parental rights stemming from the right to procreate.

Second, the right to procreate seems tied to biological elements of parenthood. The right to procreate focuses on gestational and genetic elements.[274] Whether one or both of these elements would be an exercise of the right to procreate is not readily apparent. The focus on biology to the exclusion of the parents' intent to produce the child suggests that adoptive parents who create a child through sperm, ova and uterus donation have not exercised the right to procreate, while the respective donors may have.

If collaborative reproduction is not an exercise of the right to procreate, then no parental rights automatically attach to the participants/donors. The courts must look to the elements of parenthood or other factors to determine legal maternity. As discussed earlier, the *Johnson* intent test is unworkable in the situation of stolen ova because both mothers intended to raise the child.[275] Additionally, neither the genetic nor the gestational test should be used, regardless of whether stolen ova are involved, for

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this interpretation of the *Carey* decision is plausible).

270. *See In re* Baby M., 537 A.2d 1227, 1256-61 (N.J. 1987); *supra* text accompanying note 74.

271. *See supra* notes 21-22 and accompanying text.

272. *See* Chin, *supra* note 62, at 202-03 (stating that the Supreme Court has not decided this issue).

273. *See supra* text accompanying notes 66-68, 70-77.

274. *See supra* text accompanying note 103.

275. *See supra* introduction to Part II.

two reasons. First, although both standards present compelling arguments emphasizing the importance of genetics and gestation to the parent-child relationship, neither presents a strong rationale for dismissing the other standard.[276] Second, the remaining arguments supporting these standards are essentially claims that the mother's genetic or gestational contribution to the child creates a property right in the child.[277] Doctrines that focus on the adult's physical contribution to the child in assigning rights with respect to the child injure children as a class.[278] These doctrines "overvalue procreation and undervalue nurture, at a time when nurture is in very short supply."[279]

The child's interests should be paramount in the determination of which biological mother will raise the child. The child's welfare is at stake, much more so than the mothers'.[280] Given that a custody battle often occurs during the child's developmental years, the result will permanently affect the child much more profoundly than the competing parents.[281] If the child's interests are not at the forefront, there is no guarantee that the child's interests will be fully protected. In light of these concerns and the inadequacy of the genetic and gestational standards, the best interests of the child standard should be used in assigning parental rights in the situation of the Jorges.[282]

Applying the best interests of the child standard is consistent with the general rule that it applies only when the claims of both parties are equal.[283] If collaborative reproduction constitutes exer-

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276. *See supra* Parts II.A., II.B.

277. *See supra* notes 192-98 and accompanying text (explaining the argument that property rights in genetic material equal parental rights); *supra* text accompanying notes 221-23 (explaining that the gestational mother's argument for maternity based on her physical contribution is essentially a property rights argument). *In re Clausen* is a prime example of a child being treated as a possession. In that case, the court failed to consider the child's interests in a custody battle between her adoptive and biological parents. *See Clausen*, 502 N.W.2d 649 (Mich. 1993); *supra* note 243 and accompanying text (explaining that a child's interest is generally only considered upon the finding that a biological parent is unfit).

278. *See* Woodhouse, *supra* note 110, at 114.

279. *Id.*

280. *See supra* note 267 (illustrating how a child manifests various emotional reactions to divorce).

281. *See supra* note 267 and accompanying text (describing the impact that divorce has on children).

282. *See supra* notes 1-5 and accompanying text (discussing the circumstances leading up to Loretta and Bacilli Jorge's custody suit for the twins born after Mrs. Jorge's eggs were implanted in another woman); *see also supra* text accompanying note 263 (explaining that the best interests of the child standard is most frequently applied when the child's welfare is debated).

283. *See supra* notes 244-45 and accompanying text (discussing when courts use

cising the right to procreate,[284] then both mothers have the parental rights that the right to procreate entails: at the least, the right to a continuing relationship with the child.[285] Their claims to parentage stemming from the right to procreate are equal. If collaborative reproduction is not an exercise of the right to procreate, then no parental rights are automatically attached to either mother. The court must then look to the elements of parenthood.[286] Because each mother manifests two elements of parenthood, intent/social and either genetics or gestation, each has an equally strong claim to be recognized as the child's parent.[287]

The only way to avoid treating the child as a possession is to recognize and give value to the child's relationship with both biological mothers. Under a multiple parents approach, the rights associated with parental status are distributed among the individuals who have a genetic or gestational tie to the child.[288] Although the law recognizes only one mother and father for each child,[289] in the context of collaborative reproduction, both science and the child recognize that he or she has two biological mothers and one biological father. Recognizing this reality, the best interests of the child standard should be applied so that one mother is declared the "legal mother." This woman will have all the rights of a legal parent with one exception: if it is established that it is in the best interests of the child to have a personal relationship with the non-custodial mother, she shall have visitation rights only. To give the non-custodial mother decisional authority over the child is an unworkable solution that could cause more discord for the child in

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the best interests of the child standard in custody disputes).

284. This conclusion assumes that the right to procreate exists independent of sexual intercourse and that two of the three elements of procreation are sufficient to invoke Due Process protections. *See supra* Part I.B.1.b (analyzing whether collaborative reproduction is an exercise of the right to procreate).

285. *See supra* Part I.B.1.a (exploring whether the right to procreate includes parental rights). Both mothers cannot exercise all the rights with respect to the child. Although the best interests standard is *generally* not applied to determine who is a legally-recognized parent, there is no other way to make this determination equitably.

286. *See supra* text accompanying notes 103-04 (identifying the three elements from which parental rights are derived).

287. This statement assumes that neither the gestational nor genetic relationship alone provides a superior claim to parenthood. *See supra* notes 133-54 and accompanying text (discussing cases which found custody claims based on genetics and gestation to be equal); *supra* text accompanying note 276 (noting that neither the gestation nor the genetic standard presents a strong rationale for dismissing the other standard).

288. *See* Cahn, *supra* note 111, at 44.

289. *See* Michael H. v. Gerald D., 491 U.S. 110, 131 (1988); *supra* notes 249-53 and accompanying text (summarizing *Michael H.* and the Supreme Court's rejection of the idea of a child having two legal fathers).

many cases. By contrast, the limited right of visitation would not significantly curtail the parental rights of the custodial mother.

A factor in determining whether the noncustodial mother should have visitation rights is the ability of the parties to cooperate with each other. If the custodial parents are hostile to the prospect of an adult outside their family unit visiting the child, then the child who would otherwise be in a stable and caring environment may experience significant stress.[290] The consideration of the degree and the effects of stress and whether the benefits of visitation would outweigh this stress may result in the noncustodial mother not being involved in the child's life. While this result may seem inequitable for the noncustodial mother, her interests should yield to those of the child because the child's welfare is at stake.[291] Further, there is no evidence that the child will undergo any type of psychological or emotional damage because he or she did not form a bond with the genetic parent, the woman most likely to be the non-custodial mother.[292]

Although the Supreme Court clearly stated that parental rights will only be given to one mother and one father,[293] two arguments suggest that it should find the above proposal to be consistent with this rule. First, there are situations in which the parental right to visitation is given to a third party. Some states, for instance, grant grandparents the right to visit their grandchildren.[294] Additionally, in an open adoption, the biological mother retains the right to visit the child, but exercises no other rights.[295] Second, both mothers demonstrate elements of maternity that,

290. In discussing whether court-ordered visitation between a child and her grandparents is in the best interests of the child, one commentator noted that "[i]t is difficult to comprehend how legally imposed visitation with the grandparents . . . could be in the child's best interest when the visitation places the child in the middle of an emotional minefield . . . especially . . . when . . . the child has not had contact with the grandparents and does not have a close, psychologically beneficial relationship with them." Jackson, *supra* note 131, at 580.

291. *See supra* notes 266-68 and accompanying text (describing the impact that adoption and divorce have on a child).

292. *See supra* note 229 and accompanying text (explaining that the difference in the attachment a child may feel toward a genetic parent versus an adoptive parent is unremarkable); *see also supra* note 179 (noting that proponents who argue that the child will suffer psychologically confuse the concept of self-identity with knowledge of biological heritage).

293. *See Michael H.*, 491 U.S. at 131. The Court explained that there is no basis in history or tradition for the concept that a child could have multiple fathers. *See id.* at 131.

294. *See supra* note 131 (discussing the exclusivity of parental rights and exceptions to this principle).

295. *See supra* note 131 (describing open adoptions and identifying them as an exception to the traditional concept of exclusive parental rights).

based on the standards of history and tradition,[296] were key in determining parentage.[297] The Court's acceptance of this proposal may hinge on whether the right to visitation is framed as a parental right and whether the recipient of this right is deemed a mother. There is no reason that it should be characterized as a parental right, nor is it necessary for the noncustodial "mother" to be recognized as a second mother. The important point is that the child's relationship to each woman is protected.

In light of the potential impact on the child's development and emotional stress of being separated from the only parent(s) the child knows,[298] once the child establishes a bond with one mother,[299] the court should adopt a presumption in favor of granting parental custody to the mother who is the caretaker. In most cases, the presumption will favor the gestational mother.[300] If a child develops a bond with the caretaker/mother during time spent litigating custody issues, the presumption should remain. As in the case of Baby Jessica in *In re Clausen*,[301] a child's development and emotional attachment to his or her caretaker(s) does not freeze in time when a custody suit is filed.[302]

To rebut the presumption, the non-caretaker mother should be required to demonstrate, by a preponderance of the evidence,[303] that the child will be harmed by remaining with his or her caretaker. To demonstrate this, the non-caretaker must show that the harm in uprooting the child from the only family he or she knows to live with a stranger is outweighed by the benefits to the child of

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296. The Supreme Court has indicated that ideas relating to parentage should have a basis in history and tradition. *See Michael H.*, 491 U.S. at 131.

297. *See supra* notes 211-14 and accompanying text (examining methods of proving motherhood under both common law and current law).

298. *See supra* note 267 (discussing emotional responses of children in divorce situations).

299. This generally occurs when the child is approximately three months old. *See supra* note 227.

300. In the event there is an adoptive mother, the presumption will most likely favor her.

301. 502 N.W.2d 649 (1993).

302. *See supra* text accompanying note 165 (noting that the child lived with the prospective adoptive parents during the two-year custody battle).

303. The preponderance of the evidence standard "requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [the judge] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" *In re* Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (citations omitted). Courts should use this standard of proof rather than a clear and convincing standard in an attempt to balance the child's interest in being unnecessarily removed from the home with his or her interest in being removed from a harmful environment that cannot be demonstrated under the more demanding clear and convincing standard.

living with the non-caretaker. If the non-caretaker makes this showing, then the burden of proof will shift to the caretaker, who must demonstrate that it is in the child's best interests to remain with her. In the event that the court finds the presumption to be rebutted and declares the non-caretaker to be the legal mother, the former caretaker should have visitation rights if it is in the best interests of the child.

Without a bond between the child and the gestational mother, there is no tenable argument to support a presumption granting parental rights to the gestational mother.[304] Thus, in this situation, which will likely occur before the child is born or when he or she is very young, the best interests of the child shall determine which mother is the legally-recognized mother.

Conclusion

The foregoing analysis evidences the complexity in determining legal maternity between two women when the biological aspects of maternity, genetics and gestation are separated. Courts have not yet addressed the issue of artificial reproduction and the exercise of the right to procreate. There is an increasing need for legal standards that will best protect children, as tens of thousands of children will be created by artificial reproduction.

To resolve the legal maternity dispute, courts generally examine the three aspects of motherhood among the two women: intent/social, genetics and gestation. While the *Johnson* intent standard is the most functional, it is unworkable in the situation of stolen or mistakenly-used ova because both mothers exhibit the intent/social element. The genetic standard applied by *Belsito v. Clark*[305] is undesirable because it treats children like possessions. At the core of the genetic standard is the proposition that the genetic mother's property rights in her gametes translate into parental rights in the child. The gestational test is supported by a similar rationale: the gestator's physical contribution to the child's development translates into parental rights. In both cases, the property or labor of the mother purports to give each mother "title" to the child.

Both the genetic and gestational standards are supported by evidence indicating that a child is psychologically and developmentally benefited by maintaining a relationship with each mother. In

304. *See* discussion *supra* Part II.B (examining the gestational standard for assigning parental rights).

305. 644 N.E.2d 760 (Ct. C.P. Ohio 1994).

contrast, neither standard establishes that the child's bonding with one mother instead of the other clearly benefits the child or that the child will be significantly harmed by not having a relationship with either the genetic or gestational mother.

Instead of focusing on which mother has a better claim *to* the child, the focus should be on which mother would be best *for* the child. An inquiry into the best interests of the child elevates the debate from abstract ideas about what makes a mother a mother and focuses the inquiry on the person who will be most affected by this decision: the child. A rebuttable presumption that the mother who is the child's caretaker is the legal mother, most likely the gestational or adoptive mother, will minimize the risk of removing the child from the only parent(s) that he or she knows. By adopting the best interests of the child standard as the test for determining legal maternity in collaborative reproduction cases, the interests of children will no longer be subverted by the claims of the competing mothers.

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The current members of *Law & Inequality* are committed to the *Journal's* original mission of providing a place for pieces that confront inequality in a variety of ways and from different perspectives. We offer the following pieces in keeping with that mission.

[I]t is obvious that if a man is entered at the starting line in a race three hundred years after another man, the first would have to perform some impossible feat in order to catch up with his fellow runner.

—Martin Luther King, Jr.[1]

1. WHY WE CAN'T WAIT 134 (1964).